JD–57–10
San Juan, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CARIBBEAN INTERNATIONAL NEWS CORPORATION,
d/b/a EL VOCERO DE PUERTO RICO, INC., and NEWS
DISTRIBUTOR OF PUERTO RICO, LLC,

and

Case 24–CA–11237

UNION DE PERIODISTAS, ARTES GRAFICAS Y RAMAS
ANEXAS (UPAGRA), LOCAL 33225, affiliated with THE
NEWSPAPER GUILD, CWA, AFL–CIO,

Rebekah Ramirez and *Maria M. Fernandez*, *Esqs.,* for the General Counsel.
Pedro J. Manzano Yates, Enrique R. Padro Rodriguez, and *Tristan Reyes-Gilestra, Esqs.* (*Fiddler Gonzalez & Rodriguez, P.S.C.*), and *Peter W. Miller, Esq.* (*Weinstein-Bacal & Miller, P.S.C.*), of San Juan, Puerto Rico, for Respondent Caribbean International News Corporation.
Jose R. Gonzalez-Nogueras (*Jimenez, Graffam & Lausell*) and *Jorge C. Pizarro-Garcia, Esqs.,* of San Juan, Puerto Rico, for Respondent News Distributor.
Miguel Simonet Sierra and *Rosa M. Segui Cordero*, *Esqs.* (*Simonet Sierra Law Office*), of Guaynabo, Puerto Rico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on February 2–4, March 1–5, and April 12–14, 2010. The charge was filed June 4, 2009, and amended several times thereafter. The complaint, which issued November 30, 2009, alleges that Caribbean International News Corporation, d/b/a El Vocero de Puerto Rico, Inc. (El Vocero) and News Distributor of Puerto Rico, LLC (News Distributor) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by: (1) failing to abide by the terms of a December 26, 2008 agreement relating to employees' pension plan, cancer plan, life insurance, funeral insurance, long-term disability plan, and gasoline stipend, and failing to bargain with the Union regarding these terms and conditions of employment; (2) unilaterally changing employees' pay dates, severance payments, vacation policy, and medical benefits, and denying employees their bumping rights; (3) discharging the approximately 107 bargaining unit employees who made up El Vocero's circulation department and either contracting or assigning their work to News Distributor, an alter ego company with substantially identical management, business purpose, operations, equipment, customers, supervision, ownership, and directors to El Vocero, and common labor policies, premises, and facilities; (4) assigning supervisors to perform bargaining unit employees' work in El Vocero's press department; (5) failing to notify or bargain with the Union to a good-faith impasse regarding the discharge of the circulation department's employees, the contracting or assignment of their work, and the assignment of supervisors to the printing press department; and (6) interfering with, restraining, and coercing El Vocero's circulation department's employees in the exercise of their rights under Section 7 of the Act by contracting out or assigning their work.

El Vocero and News Distributor essentially deny the material allegations of the complaint. With respect to the closing of the circulation department, they maintain that El Vocero's decision and their ensuing relationship were premised on legitimate business reasons, exigent circumstances, and the futility of further bargaining with the Union.

Nearing the conclusion of the trial on April 14, 2010, the Union offered into evidence a printout from the website www.networksolutions.com as Charging Party Exh. 4. I received the document into evidence, deemed the objections by El Vocero and News Distributor as motions to strike the exhibit, and directed letter briefs on the issue. After considering the parties' arguments in their letter briefs, I concluded that the printout was self-authenticated, but found it unreliable in several respects and, in an Order, dated April 29, 2010, granted the motion to strike the exhibit.[1]

On August 17, 2009, El Vocero filed a motion tendering its financial statements for fiscal years 2006 through 2009.[2] El Vocero bases its late submission on the fact that General Counsel's Exhibit 80 consisted of the preliminary financial statements for 2008 and 2009. It further alludes to the trial testimony of its outside accountant that their final versions would probably issue within the next 30 to 45 days. The General Counsel opposes the motion on the grounds that El Vocero did not seek, by leave or stipulation, before or after the record closed and post-trial briefs were submitted, to offer such information. Relying on Section 102.48(d)(1) of the Board's Rules and Regulations, the General Counsel contends that the tendered financial statements are inadmissible as newly discovered evidence.[3]

The Board's standard for receipt of newly discovered evidence requires a showing that the evidence was in existence at the time of the hearing, the party offering it was "excusably ignorant" of it, and that party acted with reasonable diligence to uncover and introduce the evidence. See *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46 fn. 1 (1998). The financial statements, issued on June 29, 2010, were not in existence at the time of the hearing. However, El Vocero's accountant testified that they would be issued within 30 to 45 days and, thus, El Vocero was aware that such information would exist in the relatively near future. Nevertheless, El Vocero never sought to keep the record open for receipt of such information or mention that it would seek to offer it after the record closed. Moreover, El Vocero fails to demonstrate how the proffered statements would lead to a different result from the preliminary statements, which were received in evidence and discussed in testimony. El Vocero's motion is denied.

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondents, I make the following

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[1] ALJ Exh. 2.

[2] ALJ Exh. 3.

[3] ALJ Exh. 4.

[4] The General Counsel's motion to correct the transcript, annexed to her post-trial brief, filed June 14, 2010, is granted and received in evidence as GC Exh. 130. In addition, motions submitting English translations subsequent to the close of the record by El Vocero, dated May 17, 2010, News Distributor, dated June 7, 2010, and the General Counsel, dated June 9, 2010

Continued

Findings of Fact

I. Jurisdiction

El Vocero, a corporation under the laws of the Commonwealth of Puerto Rico, with an office and place of business in San Juan, Puerto Rico, has been engaged in the publication of a newspaper in Puerto Rico and the eastern and central United States, where it annually derives gross revenues in excess of $200,000 and held membership in or subscribed to various interstate news services. News Distributor, also a Puerto Rico corporation, with an office and place of business in Carolina, Puerto Rico, is engaged in the distribution of newspapers, magazines, and compact discs in Puerto Rico, some of which advertise nationally-sold products and/or subscribe to interstate news services. In the past 12 months, News Distributor had gross revenues in excess of $200,000.[5] El Vocero and News Distributor admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. They also admit and I find that the Union, an affiliate of the Newspaper Guild unit of the Communications Workers of America (TNG/CWA), is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. El Vocero's Operations

El Vocero, a 6-day general circulation print newspaper, was founded by Gaspar Roca in April 1974. It is sold in Puerto Rico and several cities throughout the eastern part of the United States, including New York City, Miami, and Chicago. Since the early 1980s, El Vocero's main offices have been located at a leased facility in Puerta de Tierra, San Juan, Puerto Rico.[6] Its press is located in Puerto Nuevo, Puerto Rico. In 1985, Gaspar Roca sold El Vocero to a group consisting of Elliot Stein (70-percent share), Martin Pompadur (15-percent share), and Henry Crown & Co. (15-percent share). At that point, Stein, Pompadur, and Gaspar Roca comprised El Vocero's board of directors.[7] Gaspar Roca continued to serve as El Vocero's president until his death in April 2007. Upon his death, his son, Miguel Roca (Roca), replaced him as president and board member.[8]

(two motions), are granted and received in evidence as El Vocero (V.) Exh. 40, News Distributor (ND) Exh. 86, and GC Exh. 131–132, respectively.

[5] The stipulation also referred to News Distributor's business in the Dominican Republic. (Tr. 12.)

[6] There is no proof that El Vocero's landlord, Saltiel & Co., has any other connection to this controversy. (Tr. 260–261.)

[7] Stein apparently has a power of attorney to vote Henry Crown & Co.'s shares. (GC Exh. 11, 103; Tr. 258–259, 837, 903, 1025.)

[8] Prior to that time, Roca was employed by El Vocero as an investigative reporter, was in charge of El Vocero's health and safety program, and participated in other projects. (Tr. 1195–1196.) Roca is also currently part owner of : (1) an oil trading company called Adriatic Petroleum; (2) the Puerto Rico Soccer League; (2) a film production company; (3) a film development company; (4) a power company; and (5) Phoenix International Investment. (Tr. 403.)

Roca continues to serve as El Vocero's president and editor-in-chief. Angel de Jesus is finance vice president. Maria Luisa Roca is vice president for human resources.[9] Joseph Rotger is vice president for production, Ira Ellenthal is executive vice president of sales and marketing, and Luis Ortiz is press superintendent. Until July 2009, Jorge Sanchez was El Vocero's vice president of circulation.[10] Prior to July 2009, El Vocero had approximately 300 employees. It presently has about 138 employees.[11]

Until July 2009, El Vocero's circulation department distributed the approximately 100,000 daily copies of El Vocero in Puerto Rico. Pedro Martínez, Sanchez' principal assistant, served as the department's special projects and marketing manager. The department was essentially operated by six regional supervisors: Jose Fonseca, Ernesto Almodóvar, Hector Maldonado, Edgardo Westerband, Felix Muñoz, and Reynaldo Aviles; Rafael Reyes was the traffic lights supervisor. Office support was provided by administrative assistant Evelyn Barral, customer service representative Catalina Feliciano, and Data Entry Supervisor Ivonne Rivera. The regional supervisors supervised approximately 30–35 district managers. District managers were unit employees and hired and supervised distribution agents, dealers, and carriers. The agents, dealers, and carriers were divided into two major distribution sections—the metropolitan area and the inland areas. Depending on the area to which they were assigned, distribution agents and dealers, directly or through other agents, distributed the newspaper to retail stores, newsstands, traffic light locations, and residential newspaper carriers. Distribution agents and dealers performed collections, were paid on commission, and received a gasoline reimbursement rate or car allowance provided in the collective-bargaining agreement (CBA) between El Vocero and the Union. Neither traffic light vendors nor newspaper carriers, however, were El Vocero employees.[12]

B. News Distributor's Operations

News Distributor, a newspaper distribution company, provides distribution services to 14 media companies, but its primary customer is El Vocero. The other companies, none of which are owned by or affiliated with El Vocero, publish magazines: Caribbean Business, The San Juan Weekly, TV Aqui, Artes, Empresarios, Entorno, Identidad, Ritmo Musical, New Condado, Arq. I. Tec, Latin Gospel, Arte Latinoamericano, Photosports PR, and No Quejas.[13]

News Distributor commenced operations on July 6, 2009, with Roca as president. At the time, it was operated rent free out of El Vocero's offices by Sanchez, News Distributor's executive vice president. While performing that function, Sanchez continued serving as El

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[9] Maria Luisa Roca is Gaspar Roca's widow and Miguel Roca's stepmother. (Tr. 263–264.)

[10] The parties stipulated that these individuals were 2(11) supervisors during the time they were employed by El Vocero. (Tr. 16–21.) In addition, the newspaper's masthead sets forth their individual positions at El Vocero. The latest one is dated July 31, 2009 (GC Exh. 76a; Tr. 785–794.)

[11] Since July 2009, there have been other layoffs in addition to those at issue in this case. (Tr. 274.)

[12] There was no dispute as to the roles of circulation department employees prior to July 2009. (Tr. 39–40, 125–129, 133–135, 420, 470–477, 484–485, 544–545, 703–704, 783–784.)

[13] Although Sanchez vaguely recalled that News Distributor started distributing Caribbean Business in or around August or September 2009, he provided no information as to when News Distributor began distributing the other 12 magazines. (Tr. 91–95; ND Exh. 43–48.) In any event, August Fields' credible testimony that none of the other 13 publications were owned or managed by anyone connected with El Vocero went unrefuted. (Tr.1686.)

Vocero's vice president for circulation until July 30, 2009.[14] In August, News Distributor moved its operations to an office building in Carolina, Puerto Rico. It operated rent-free at that location until December 2009.[15] In January 2010, August Fields, an experienced newspaper executive, replaced Roca as News Distributor's president. That month, News Distributor moved to another office building pursuant to a sublease agreement with Prime Printing, a company owned by Roca.[16] At that point, News Distributor began paying rent. In March, News Distributor moved to another location and was no longer subleasing from Prime Printing or any other entity in which Roca had an ownership or other legal interest.[17]

All of News Distributor's regional team leaders were former El Vocero regional supervisors, district managers or store managers: Fonseca, Almodóvar, Avilés, Reyes, Westerband, Muñoz, Maldonado and Abner Ortiz. Evelyn Barral, a secretary in El Vocero's circulation department, is an administrative assistant for News Distributor. Catalina Feliciano, an office clerk, worked in El Vocero's circulation department as a customer service clerk. Ivonne Rivera, an office team leader, was the circulation department's data entry supervisor. Finally, Area Supervisor Juan Velez was a former temporary employee of El Vocero.[18]

Prior to January 2010, News Distributor had not developed written employment policies and procedures and did not have an employee manual. Indeed, News Distributors did not even have written agreements with any of its clients. After Fields' arrival, News Distributor adopted various policies relating to operating and security procedures, an employee manual, and personnel policies. Aside from the dual roles served by Roca as president of both El Vocero and News Distributor until January 2010, no other officers of El Vocero have had any authority since July 2009 regarding the formulation of News Distributor's labor relations policy or the terms and conditions of employment of its employees.[19]

C. The Union's Relationship with El Vocero

The Union has represented El Vocero employees since the newspaper was founded. It currently represents 68 to 70 of its workers.[20] Néstor Soto has been the Union's president since 2002. Angel Baez is executive secretary. Luis Quintana is secretary-treasurer.

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[14] The evidence is not clear as to the division of labor between Roca and Sanchez, who remained listed on El Vocero's masthead until July 30, 2009. However, together with Martinez, they were the primary participants setting up News Distributors. (GC Exh. 76; Tr. 16.)

[15] Roca and Sanchez were unaware as to whether News Distributor paid rent to El Vocero or anyone else. (Tr. 43–44, 47, 333.) De Jesus, on the other hand, believed that there was an agreement in writing requiring News Distributor to pay for rent and telephone usage, but could not produce it and then conceded that the alleged charges are still outstanding. (Tr. 887–888.)

[16] Aside from leasing commercial space, Prime Printing does not appear to have any other function. (Tr. 928.)

[17] Fields' credible and unrefuted testimony established that News Distributor began paying rent to Prime Printing in late December 2009 until it moved to another location in March 2010. (Tr. 1634–1637; ND Exh. 22.)

[18] The roles of News Distributor's key employees were also not disputed. (Tr. 63–67, 779, 782–784, 822.)

[19] There is no doubt that, prior to January 2010, News Distributor had no policies or procedures in place. (ND Exh. 12–21; Tr. 74–75, 1654–1656, 1692–1694.)

[20] The Respondents did not dispute Nestor Soto's estimate as to the size of the bargaining unit at El Vocero. (Tr. 430.)

The last collective bargaining agreement (CBA) between El Vocero and the Union was effective from June 2, 1997, to May 31, 2001, and extended by stipulations through May 31, 2009. The appropriate bargaining unit included reporters, photographers, office personnel, distribution agents, maintenance employees, janitors, district managers, radio operators, dispatch employees, group leaders, press helpers, press employees, accountants, drafters, copywriters, production employees, and classified employees. It excludes managerial staff, department directors and supervisors, secretaries, advertisement sellers, and newspaper deliverers (Art. I).[21]

The CBA's pertinent provisions included: a 30-day prior notification requirement to employees being laid off with a right to such employee, if competent and capable of performing the job, to bump another employee from another position based on seniority (Art. IX); severance pay to laid-off employees equal to 2 weeks of pay for each year of service, with the total sum being no less than 8 weeks and no more than 52 weeks of their regular pay; (Art. X); 23 paid holidays (Art. XIII); paid vacation days (Art. XIV); paid sick leave (Art. XV); a weekly car allowance of $180 to $235 (Art. XX); and a $315 monthly contribution towards an employee selected medical plan,[22] intensive care and cancer treatment plans, life insurance, pension, funeral ("terminal") insurance, retirement and savings plans,[23] and disability insurance (Art. XXII). Not included in the CBA was the Employer's longstanding practice of paying its employees on Thursdays at or before noon.[24]

In addition to its functions as a labor organization, the Union continues to provide significant support to another island newspaper, the Puerto Rico Daily Sun (The Daily Sun). The Daily Sun, a daily English-language newspaper founded in October 2008 is owned by the Cooperativa Prensa Unida (the Cooperative). It essentially replaced the San Juan Star, which ceased publishing in September 2008, as the primary English-language newspaper in Puerto Rico. When the San Juan Star closed, several of its employees, who were also Union members, formed the Cooperative, which then established The Daily Sun. The Daily Sun publishes approximately 35,000 copies per week and is marketed at 1300 locations throughout Puerto Rico.[25]

The Union and its parent organization, TNG/CWA, invested heavily in and provided significant start-up funding for the Cooperative.[26] Upon commencing operations in October 2008, The Daily Sun operated partly out of the Union's facilities. Many of The Daily Sun's organizational, shareholder, and board of directors meetings have been held at the Union's offices. The Union also continues to serve a vital role in The Daily Sun's ongoing operations by permitting three Daily Sun employees to operate rent free out of the Union's offices, use its office equipment, and receive mail there. Soto has attended at least one meeting of The Daily Sun's board of directors and was instrumental in helping it obtain local government grants

[21] GC Exh. 12.

[22] Bargaining unit members selected "MAPFRE" as their medical plan during the term of the CBA. (Tr. 298.)

[23] The Union agreed in 2006 to relieve El Vocero of its financial contributions towards employees' retirement and savings plans. (Tr. 290.)

[24] Contrary to the General Counsel's assertion, the CBA is silent on the issue of a scheduled payday. On the other hand, El Vocero does not dispute that this was its customary practice throughout the term of the CBA and its subsequent extension.

[25] ND Exh. 62.

[26] ND Exh. 65.

totaling $1,750,000 to cover payroll, as well as a $25,000 contribution from the Newspaper Guild. Baez has also provided assistance, personally loaning $3500 to The Daily Sun.[27]

D. El Vocero's Financial Condition

The newspaper industry in the United States has been in a state of economic flux. Over the past decade, the industry's advertising revenues have diminished. A typical print newspaper operation relies on advertising for 80 percent of its budget; the remaining funding source comes from its circulation, which includes subscriptions, newsstand sales, and single copy sales. In 2008, the newspaper industry experienced its worst financial performance ever. Advertising revenues decreased by $7.5 billion, or 16.5 percent from the previous year. The primary reasons related directly to the Internet and cable television markets, both of which have grown substantially. There was a diminished amount of revenue coming in the newspapers between 2000 and 2007. As with the Internet, cable television's advertising growth has resulted in a substantial contraction in revenue for the newspaper industry, since fewer people now read printed newspapers. As a result, rather than being able to raise necessary revenue through advertising rate increases, many newspapers have had to lower advertising rates. This, in turn, has resulted in newspapers selling fewer pages and at lower prices.[28]

El Vocero's economic condition was no exception to the state of the newspaper industry in the United States during 2007–2008. For fiscal years 2006–2007,[29] El Vocero's losses amounted to approximately $7 million. From 2007 to 2008, the accumulated deficit increased to $58,465,305. El Vocero had approximately $10 million in account receivables. However, its current liabilities in 2008 were over $29 million. El Vocero's ratio for 2008 was 0.30-1, an indicator that its financial situation over a period of 1 year worsened by a factor of three times. Not enough money was coming in to support and sustain El Vocero's cost structure.[30] Much of this financial predicament was the lingering fallout from its ill-fated purchase of the former El Tiempo. According to El Vocero's most recent preliminary financial report:

> [El Vocero] has incurred recurring operating losses since 1998, mainly resulting from its attempt to start up and publish the newspaper "El Mundo." As a result of such losses, [El Vocero] has stockholder' equity deficit [amounting to] $64,192,400 and a significant

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[27] The denial of Soto and Baez as to the extent of the Union's support for The Daily Sun was less than credible. Javier Colon, the President of the Cooperative and the head of circulation at The Daily Sun, reluctantly testified as to significant support provided by the Union for The Daily Sun. (Tr. 575–576, 588, 1138–1141, 1346–1351, 1381–1382, 1419, 1450–1455, 1572–1574, 1609–1613; ND Exh. 67, 71, 77, 82.)

[28] El Vocero's newspaper industry expert, Ira Ellenthal, testified as to the financial condition of the newspaper industry in the United States. He attributed much of the industry's financial predicament to the rising popularity of the Internet. Notwithstanding his lack of knowledge as to newspaper circulation and advertising figures, newspaper industry layoffs, and the extent of Internet usage in Puerto Rico (Tr. 1078–1080), I found his opinion credible, uncontradicted, and somewhat indicative of the fact that El Vocero's financial problems were typical of those of others in the newspaper industry's financial condition within the United States, including the Commonwealth of Puerto Rico. (Tr. 1061–1065.)

[29] It appears that El Vocero's fiscal year runs from May 1 to April 30. (GC Exh. 80.)

[30] I based my findings regarding El Vocero's financial condition on the credible and unrefuted testimony of El Vocero's certified public accountant, Jorge Aquino, and to the extent consistent therewith, the testimony of de Jesus. (GC Exh. 80; Tr. 1068, 1071–1073, 1099–1101, 1112, 1165, 1192.)

working capital deficiency [amounting to] $32,137,000 as of April 30, 2009. The management's plans and actions taken toward achieving future profitable operations are as follows:

1. Since December 5, 1998 through April 30, 2006, the Company's stockholders and the former chief executive officer have made advances of funds to cover financial operational deficiency [amounting to] $2,200,000 and $28,120,000, respectively.

2. Effective April 2000, [El Vocero] discontinued the publication of the newspaper "El Mundo."

3. [El Vocero's] stockholders and the former chief executive officer were executed a subordination of the secured notes payable in order to execute the security assignment to reflect the preferences of payment, as a guarantee, on behalf of the former newsprint supplier. Thereafter, the [supplier extended] the credit to [El Vocero] with a personal guarantee from the former chief executive officer limited to the amount of $1,000,000.[31]

When Roca became president on April 11, 2007, he met with de Jesus and Jose Muñoz to discuss El Vocero's financial condition. Roca was informed that El Vocero was operating at a deficit of at least $800,000 per month and needed to reduce expenses. Expenses amounted to approximately $4 million per month, while revenues fluctuated between $2,400,000 and $3,200,000. Roca immediately met with the board of directors, which also served as a meeting with El Vocero's shareholders. After discussing El Vocero's financial condition, the group decided that Roca would seek various approaches to reduce expenses.[32]

Roca immediately sought to eliminate services that were not essential to the newspaper's operation. He evaluated every department for potential cuts. Many freelance employees were eliminated, and Roca directed the newspaper be reduced in size by 8 pages and the amount of printed newspapers by 10 percent. El Vocero was forced to purchase newsprint from El Nuevo Día, its main competitor.[33] In addition, Roca began meeting with Union officials to brief them on El Vocero's financial situation and request concessions. Negotiations resulted in an agreement by the Union, dated August 2, 2007, to the following concessions: a 6-month reduction in the car allowance to 25 percent; a reduction in El Vocero's contribution to the medical plan to $317 for up to 1 year; and holding in abeyance gasoline stipend payments owed to the agents and salaried employees. In exchange, El Vocero agreed to: allow yearly financial audits by the Union, as well as provide the Union with the information necessary to carry out such audits; grant unit members six floating holidays; and renegotiate higher salaries if it started to make a profit. The Union had an escape clause with respect to any provisions that El Vocero failed to comply with.[34]

[31] GC Exh. 80, p. 18.

[32] Roca testified that, after being briefed about the fiscal condition, he met with four shareholders, although the 1985 sale of El Vocero only referred to Stein, Pompadur, and Henry Crown & Co. While I do did not draw a negative inference regarding the absence of testimony by any of the shareholders, I find it doubtful that Gaspar Roca, without an ownership interest, would continue to pump millions of his own money into El Vocero over the years without involving the shareholders. (Tr. 1196–1198.)

[33] There is no evidence that the Union disputed these actions. (Tr. 1197–1198.)

[34] GC Exh. 13.

E. El Vocero Seeks to Restructure the Circulation Department

Between April 2007 and the end of the year, Roca also sought to increase advertising sales. However, he received a negative response from the advertising agencies, who complained that the newspaper was inefficiently distributed, often arrived late, and failed to reach newsstands, residences, or even entire areas of the island. Roca investigated those complaints and determined that the distribution problems reached back to 2001. He responded by devising a plan with Sanchez to restructure the circulation department by increasing and improving the efficiency of El Vocero's distribution without increasing costs. The initial concept was to reclassify agents as minidealers, who would employ straight commission distributors. [35]

On September 6, 2007, Sanchez and Roca met with several union officials to discuss in detail the planned restructuring of the circulation department. He stressed the newspaper's need to increase its circulation in order to increase revenue and avoid drastic cuts, and provided the Union with Sanchez' initial draft proposal. The Union proposed changes to the proposal and the parties agreed to have further negotiations on this issue. The parties met several times a week to discuss the proposal.[36] During the discussions, El Vocero proposed that independent contractors or distributors, also referred to as minidealers, distribute the newspaper. The most important discussions focused on whether minidealers, who would report to district managers (or distribution agents), would be in the bargaining unit.[37]

On September 20, 2007, Sanchez met with the Union's reorganization committee. The committee's members expressed concerns and asked questions regarding certain details of the proposed reorganization. The questions related to the proposed duties and responsibilities of the independent distributors, minidealers, and district managers, the size of their respective territories, and the formulas for the payment of the sales commissions.[38]

On September 24, 2007, the Union's reorganization committee met with Roca and Sanchez. In pertinent part, the union officials conceded that the current distribution process was not working well, that they had not yet evaluated the process regarding the proposed reorganization, asked about the economic impact on the circulation department regular employees, proposed discussing the proposal as part of negotiations for a new CBA. They expressed concerns that scheduled meetings to brief employees should be done at different locations throughout the island and not just at headquarters. Roca insisted that he had a right to brief the employees at headquarters.[39] On September 27 and 28, Roca and Sanchez met with Union delegates and other employees. The Union's approach at these meetings was "to listen and ask questions" and to eventually request a vote by the membership once El Vocero's final reorganization plan was evaluated by union officials and delegates.[40]

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[35] The Union did not refute Roca's contention regarding the inefficiencies and problems with El Vocero's distribution system. (Tr. 1198–1205.)

[36] Soto did not dispute Roca's concerns regarding the advertising companies' complaints and the need for improvement in circulation. (V. Exhs. 1–2; Tr. 478, 554–556, 564, 1206–1209.)

[37] Soto and Baez provided only general testimony about the negotiations between September and November 2007. (Tr. 479–483, 642–649.) As such, subsequent findings as to the chronology of events leading up to a finalization of a proposed agreement are based on correspondence between the parties.

[38] The accuracy of the details in Sanchez' memorandum to Roca regarding this meeting was not disputed. (V. Exh. 3.)

[39] V. Exh. 7.

[40] Several translations refer to the "Departamento de Circulación) as the "Traffic

Continued

Roca and Sanchez followed up the meetings with the union officials and delegates by scheduling a series of meetings to brief employees and answer questions about the proposed reorganization. The meetings were held on September 27–28, October 4, 5, 25, and 26.[41] During this entire feedback period, the only part of El Vocero's plan to be reconsidered after Sanchez received concerns from department heads was the proposed utilization of part-time distributors.[42]

In November 2007, Roca and Sanchez met with the Union's delegates and outlined the reorganization proposal, as modified after discussions with the Union. The presentation explained changes in the organizational structure and duties of employees in the circulation department, the consolidation of certain positions, and the anticipated impact on the newspaper's distribution, applicable salary and commissions to be paid newly-created positions. After receiving employee feedback at numerous meetings, union officials agreed to submit the revised proposal to the union membership for a vote. The membership voted on the proposal on February 23, 2008 and rejected it.[43]

Undaunted, Roca asked Baez to have the Union work with El Vocero to revise the first proposal in order to make it palatable to the membership. Baez agreed and the parties renewed discussions in March 2008. Approximately 15 to 20 additional meetings were held to discuss El Vocero's second proposal. The parties held approximately two meetings per week. The discussions focused on how to eliminate overlapping between 14 distribution agents who handled subscriptions and 15 others who handled single copy sales. El Vocero, seeking to create 29 smaller zones with distribution agents performing both functions, incorporated the Union's reconfiguration of those zones.[44] In March 2008, the Union informed its membership as to the ongoing discussions with El Vocero regarding the reorganization of all departments, not just circulation. Highlighted was the Union's admonition that only union officers were authorized to negotiate with El Vocero's management.[45]

On April 29, Roca submitted El Vocero's second proposal to the Union. Its most significant portion was a proposed reorganization based on classifications for the positions of division leaders, dealers, district managers, minidealers (to replace distributing agents), and independent contractors. The proposal, which was broken down into the smaller metropolitan and island sections or zones, eliminated 38 agent positions, but 32 were temporary employees and of the remaining 7 regular employees, 6 would be transferred to district manager positions.[46]

Department." (GC Exh. 43.) Interpretation of that term throughout the trial indicates that it actually refers to the circulation department.

[41] V. Exhs. 4–6, 8, 10–11.

[42] Sanchez' November 13, 2007 memorandum to Roca reporting such concerns is the only evidence of a change in position during the latter part 2007. (V. Exh. 12.)

[43] Neither Soto nor Baez disputed Roca's description of the process leading up to the generation of the first proposal. (Tr. 1218–1221.)

[44]Although Roca's assertion that union input was limited to changing certain language in a second proposal, the Union's involvement in proposing the redrawing of the zones evidenced a more substantive involvement. (Tr. 1225–1229, 1243–1244, 1784–1786.)

[45] GC Exh. 44.

[46] V. Exh. 13.

Around May or June 2008, the union membership rejected El Vocero's second proposal. Soto and Baez told Roca that the metro area employees accepted the proposal, but the inland employees rejected the same.[47] After the second proposal was rejected by the union membership, Roca informed Soto and Baez that, since the Union was resisting cost reductions, he would have to terminate employees.[48] Baez responded that "it was better to fire employees than lose acquired rights."[49]

Notwithstanding his plans to terminate employees after the second proposal was rejected, Roca continued efforts to devise yet another proposal which would be sufficiently palatable to a majority of the Union's membership. In that respect, he urged the Union to resolve the differences between the island and metropolitan area distributing agents. The Union acquiesced by forming a committee of agents representing the various geographical areas. The committee met approximately five times, but no agreement was reached. Thereafter, the reorganization committee of El Vocero management and union delegates continued to meet until the summer of 2008. However, due to the continued stalemate between union members from the island and metropolitan sections, Soto instructed union delegates not to engage in negotiations or submit counterproposals but, rather, listen and ask questions regarding El Vocero's reorganizational proposals. As a last resort, El Vocero proposed a combination of reductions in fringe benefits and some restructuring changes in the distribution areas. The union representatives, however, maintained their insistence that El Vocero pay all benefits under the CBA and reiterated their preference for layoffs rather than acquiesce to El Vocero's proposal to reduce benefits. On August 5, 2008, Roca's irritation was evident in a memorandum to all personnel. In it, he railed at the Union's position, informed personnel about the likelihood that advertising revenue would decrease if circulation numbers did not improve, and, as a result, El Vocero would be forced to lay off approximately 75 positions in various departments.[50]

In the meantime, El Vocero began to encounter problems meeting its obligations under the CBA. On several occasions during September through November 2008, El Vocero was unable to issue paychecks to employees on the scheduled date. In several meetings, as well as letters, Roca informed employees and the Union that the late paychecks were due to a cash flow problem caused by a combination of slow payments by advertisers and cash-on-delivery payments to paper suppliers.[51] Additionally, El Vocero had stopped contributing to its employees' pension and 401(k) plans, and providing employees with gas subsidy payments. In August and September 2008, El Vocero and the employees' health insurance provider notified employees that various insurance coverages for cancer treatment, intensive care, life insurance, funeral insurance, and long-term disability insurance had been canceled for nonpayment. The Union protested the nonpayment and cancellations in letters, dated July 31 and August 5, 2008, and insisted that El Vocero resolve the nonpayment problem.[52]

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[47] Neither Soto nor Baez disputed Roca's interpretation of the island vs. metropolitan area workers preferences for the first and second proposals. (V. Exh. 14; Tr. 1257–1266.)

[48] While it is not disputed that El Vocero's ad revenue was dropping during this period, there is no indication that Roca shared that information when he informed the Union that he needed to start terminating employees in order to reduce costs. (Tr. 1247–1248, 1255–1256, 1266.)

[49] Baez did not dispute Roca's testimony as to the Union's defiant attitude regarding the possibility of layoffs. (Tr. 1254–1256.)

[50] Soto's testimony essentially confirmed Roca's testimony that the Union, ensconced behind the provisions of the CBA which was effective until 2009, chose to refrain from bargaining over a third proposal. (Tr. 581–585, 1253–1254, 1266; V. Exh. 15.)

[51] GC Exhs. 24–27.

[52] GC Exhs. 18, 35–36, 52, 72.

At some point in September, discussion regarding El Vocero's reorganizational proposal became intertwined with efforts to resolve the problems with late salary payments and nonpayment of benefits. Roca agreed to provide the Union with another proposal by September 15 for consideration by the union membership. In anticipation of that proposal, Soto scheduled an emergency meeting of the union membership for September 20. The proposal arrived on September 19, a day before the meeting. Roca was permitted to address the proposal before the membership and actually articulated several proposals to reduce expenses, all involving reductions in salary or benefits. All were rejected, but the Union agreed to continue meeting with Roca to find a solution. Union leaders responded with a counterproposal but Roca, in turn, rejected that and submitted yet another proposal to the Union on September 25. In a letter dated the same day, Soto acknowledged receipt of the proposal and noted that he and a group of employees were still reviewing El Vocero's financial statements. He added that, although the financial analysis was still in progress, a preliminary review revealed two types of expenses that should be eliminated or reduced: work performed by 23 subcontractors, which was previously performed by employees and could be redistributed among unit members, for a savings of about $50,000; and payments to Gaspar Roca's relatives.[53]

On September 27, the union membership convened again to consider alternative proposals submitted by Roca, all of which involved salary reductions. The proposals were rejected. In a letter, dated September 29, Soto informed Roca of the result, but noted that the Union wished to meet with him to continue efforts to find possible alternatives to address El Vocero's financial problems. He also warned Roca that if El Vocero again failed to pay employees on time, as required by the CBA, employees would report for their shifts but would not perform any work.[54]

The parties met again on October 17, 2008. At that meeting, after Roca briefed the union officials as to El Vocero's financial condition, the Union requested that he "submit alternatives that could help to resolve the situation" along with "several adjustments in expenses that have been indicated in other occasions." Soto also advised Roca that any further proposal needed to differ from those already rejected by the membership. Soto outlined these developments in a letter, dated November 3, 2008, and reminded Roca that the Union still had not received his proposal.[55]

Unbeknownst to the Union, El Vocero was moving forward with layoffs. In a memorandum to the human resources department, dated October 30, 2008, Sanchez, citing "the reorganization" of El Vocero and "the emergency due to economic reasons," provided a list of 40 circulation department employees to be laid off on November 7, 2008. They consisted of 33 district managers and 7 division leaders; 30 were regular employees and 10 were temporary employees.[56] In a letter, dated November 24, 2008, and faxed the same day, Roca notified the Union as to how the circulation department would operate in the absence of the discharged employees.[57] Soto immediately responded by noting that the parties met on many occasions and, at each one, El Vocero presented a different reorganization proposal and none were "subject to negotiation since . . . there is a [CBA] between the parties in effect; yet what you intend to do is to open the [CBA's] negotiations, to which the Union opposes." Nevertheless,

[53] GC Exh. 57.
[54] GC Exh. 58.
[55] GC Exh. 59.
[56] V. Exh. 16.
[57] V. Exh. 17.

Soto agreed to convene the membership to consider El Vocero's reorganizational and cost-cutting proposals.[58] The same day, the Union also informed its membership about El Vocero's "unjustified" layoffs and attempts to impose a reorganization of the circulation department by consolidating distribution agent positions and have them perform the work of laid-off district managers. It also advised members that supervisors could not force distribution agents to distribute newspapers in "down" routes, except as specified under the CBA.[59]

After receiving notice of the layoffs, Roca agreed to meet with the union leaders on November 25, 2008. Shortly before the meeting, Soto sent a letter to Roca outlining the Union's position.[60] At the meeting, Roca reiterated El Vocero's worsening financial condition and the need to reduce costs; the Union maintained its position that the CBA prevented El Vocero, in the absence of an agreement, from consolidating or reorganizing bargaining unit positions or work. The meeting was followed by an exchange of accusatory correspondence between Roca and Soto. However, the parties continued to meet into December 2008. There was little progress regarding union concessions until the layoffs actually took effect on December 5, 2008.[61]

By letters, dated November 26 and December 4, 2008, Roca and Soto exchanged accusations about the rigidity of their respective positions. Roca charged that the Union was unreasonably rejecting his reorganizational proposals. Soto denied that assertion, and insisted the Union considered all of El Vocero's proposals and submitted its own counterproposals, which Roca rejected.[62] Notwithstanding the contentious exchanges, the parties met continuously during the period of December 15–19, 2008. Those efforts produced a tentative agreement, subject to ratification by the union membership. On December 20, 2008, the membership voted to ratify the stipulation, subject to El Vocero's reaching an additional agreement with the Newspaper Guild regarding the employees' pension plan. Roca was notified of this development by letter, dated November 22, 2008.[63]

Notably, during the various meetings in 2008 regarding El Vocero's reorganizational proposals, Roca never mentioned the possibility of having to eliminate the circulation department or contract out that department's work to another company. Nor did he assert that the parties had reached impasse. He did, however, mention at one point in 2008 his interest in creating new companies, but assured union officials that such a plan would not affect bargaining unit employees.[64]

F. The December 26 Agreement

On December 26, 2008, El Vocero and the Union executed a written agreement in which the Union agreed to economic concessions in exchange for the reinstatement of some benefits and policies, effective January 1, 2009, for a 12-month term (the December 26 Agreement). The

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[58] GC Exh. 47.

[59] GC Exh. 45.

[60] GC Exh. 48.

[61] Roca's testimony and corroborating documentation indicate that the employees were not actually laid off on November 7, as Sanchez' October 30 memorandum suggests, but rather, on or about December 5. (GC Exh. 41; V. Exhs. 18–19; Tr. 1271–1273, 1276–1277.)

[62] GC Exh. 60; V. Exh. 19.

[63] GC Exh. 40.

[64] It is undisputed that the possibility of a circulation department closing never made it on the agenda in 2008. (Tr. 139, 649–650, 738.)

concessions included: a reduction of annual vacation days from 27 to 20; a reduction of annual sick leave from 22 to 15 days; reduced overtime pay from double to time and a half; a 5-percent wage reduction; a 5-percent commission reduction for commissioned agents; a 10-percent reduction in reimbursed car expenses; and an additional year of no 401(k) payments. In return, El Vocero was to resume making contributions into the employees' pension plan, albeit at a reduced rate during the first 3 months of 2009, and reinstate the cancer, intensive care, life insurance, funeral insurance and long-term disability plans, and the gasoline stipend. The December 26 Agreement provided that those benefits would be reestablished as of January 1, 2009. In exchange for the concessions, El Vocero would also reinstate 12 district managers and 1 prepaid subscriptions manager, and convert 5 part-time employees to permanent full-time employees. In addition, El Vocero would reinstate 12 employees previously laid off from the circulation department.[65]

By letter, dated December 29, 2008, Roca informed El Vocero's employees about most of the concessions in the December 26 Agreement, and noted that the "approved savings of this agreement will permit us to reinstate the benefits that were not fulfilled in the past."[66] Approximately $125,000 of the $500,000 in expenses that El Vocero sought to reduce came from the Union's concessions. Roca also implemented immediate cost-saving measures by reducing the newspaper's printed pages and sections from two to one, and the amount of distribution.[67] The Union issued its own summary version of the December 26 Agreement to the membership on December 30, 2008.[68]

G. El Vocero Fails to Comply with the December 26 Agreement

El Vocero's financial condition did not improve as it entered 2009.[69] Sales receipts in December 2008 were 30-percent less than in December 2007 and numerous advertisers were refraining from making commitments for 2009. January and February 2009 sales continued on a downward spiral—25-percent less than the comparable periods in 2007, while paper costs were increasing. Its expenses were substantially higher than the advertising and circulation income, and the accumulated deficit had increased to $64,192,385.[70]

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[65] GC Exh. 14.

[66] GC Exh. 21.

[67] Roca's estimates of the savings resulting from the Union concessions and reduction in newspaper print and distribution were not disputed. (Tr. 1279–1282.)

[68] GC Exh. 41.

[69] El Vocero's newspaper industry expert, Ira Ellenthal, provided an overly broad description of financial problems faced by the newspaper industry in the United States. There is no dispute, however, that many newspapers closed due to a drastic decline in circulation and thousands of newspaper employees were laid off in 2009. (Tr. 1065–1068.)

[70] De Jesus credibly testified that El Vocero was hampered by a lack of working capital, an accumulated deficit of $64,192,385, operating losses of $1,373,500 in 2008 and $4,164,640 in 2009, and net operating losses of $3,213,791 in 2008 and $5,727,020 in 2009. Based on that financial information, he concluded that El Vocero is in a liquidation basis of accounting and, therefore, the likelihood of the Company continuing to operate is minimal. (Tr. 1161, 1163, 1166; GC Exh. 80.) On the other hand, the weight of the financial evidence and testimony by de Jesus strongly suggests, given his close, ongoing involvement with El Vocero's finances and Roca, that Roca was well aware of the problem in obtaining commitments from advertisers for 2009 when he signed the December 26 Agreement – a mere 5 days before the new year.

El Vocero's continuing cash flow problem and difficulty paying expenses caused its paper supplier, once again, to withhold delivery after accumulating a balance of $3 million. Like many other struggling newspapers, El Vocero began seeking ways started to reduce its operating costs. Pursuant to the December 26 Agreement, El Vocero reinstated employees and reduced employees' wages, vacation, sick leave, overtime pay, and car allowance on January 1, 2009. Without notifying or consulting with union leaders, however, El Vocero decided not to make the payments necessary to reinstate the cancer plan, intensive care plan, life insurance, funeral insurance, and long-term disability insurance. It also failed to make the requisite contributions into employees' pension and 401(k) plans, and did not reinstate employees' gas subsidy, vacation days, and sick days.[71]

By letters, dated January 22 and March 9, 2009, the Union demanded El Vocero's compliance with the terms of the December 26 Agreement. The parties met several times, but El Vocero still failed to comply with the terms of the December 26 Agreement.[72] Roca explained to the Union during meetings in March and April that El Vocero's financial situation was getting worse and it was unable to pay its debts, including meeting payroll, and might have to close if a solution was not found. Additionally, memoranda advising employees that paychecks would be issued a week late were distributed in April and May 2009. The union leaders were not impressed and bargaining unit members started engaging in work stoppages.[73]

By letter, dated June 1, 2009, the Union notified Roca that the union membership voted on May 30 to terminate the December 26 Agreement due to El Vocero's noncompliance.[74] El Vocero did not respond and employee benefits continued to be adversely affected. By letter, dated June 16, 2009, El Vocero's insurance agent informed the Union that El Vocero owed $308,129 in past due premiums for the medical insurance plan.[75] On June 30, 2009, without consulting the Union, El Vocero changed the employee-selected medical plan from MAPFRE to MCS, effective July 1, 2009, and reduced its monthly medical plan contribution for each employee from $315 to $213.93 per month.[76] The Union received another insurance notice, dated July 2, 2009, detailing unpaid premiums of $74,567 for cancer and funeral coverage, and their fruitless efforts in collecting from El Vocero.[77] Roca explained to Soto and Baez that El Vocero did not have enough funds to pay the past due premiums and he was searching for

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[71] This finding is based on the consistent testimony of Roca, Soto, and Baez, as well as correspondence confirming nonpayment of benefits. (Tr. 295–298, 521–523, 636–642, 916–917, 1071–1075, 1111–1114, 1192, 1282–1284.)

[72] GC Exhs. 30, 42.

[73] Although de Jesus' provided a credible explanation of El Vocero's 2009 asset-ratio of 10 cents in assets for every dollar of liabilities, his contention that El Vocero would have to close by May or June 2009 unless it took drastic action is belied by the fact that El Vocero remained in business. Moreover, there is no evidence that Roca provided the union with El Vocero's asset-ratio information during their meetings in early 2009. On the other hand, testimony by Soto and Baez did nothing to dispel the notion that union leaders were chastened by the earlier membership votes, causing them to pull back from any joint initiatives with management. (Tr. 295–296, 1074, 1163–1164, 1285–1287, 1760–1761; GC Exhs. 31, 33, 80.)

[74] GC Exh. 53.

[75] GC Exh. 54.

[76] GC Exhs. 19–20.

[77] GC Exh. 51.

another insurance provider to provide the coverage. Soto continued to insist that El Vocero comply with the terms of the December 26 Agreement.[78]

In addition to its noncompliance with the December 26 Agreement, El Vocero failed to meet its wage obligations under the CBA. On numerous occasions from September 2008 through July 2009, El Vocero did not pay employees at or around the customary noon time on Thursdays but, rather, 1, 2, and 3 weeks later. On several of those occasions, including March 4, April 21, May 14, and June 19 and 25, 2009, Roca explained to employees that the delays were attributable to late payments by advertisers. The Union protested these delays as violations of the CBA, but to no avail.[79] Similarly, on May 13, 2009, El Vocero, without consulting the Union, reduced severance pay to a rate of $250 per week.[80]

H. Roca Forms News Distributor and Five Other Companies

In February 2009, around the same time El Vocero was reneging on its obligations under the December 26 Agreement, Roca decided that he would drastically reduce the newspapers' operations. By early March, he took the first steps toward that objective by filing to create six new entities.[81] Roca asked Sanchez to run the daily operations of a media distribution company to be called News Distributor.[82] On March 4, 2009, Roca initiated the incorporation process for News Distributor and five other new entities: La Prensa Libre de Puerto Rico, LLC (La Prensa), a print media company; Multi Services Company, LLC (Multi Services), a media utility company; Multi-Media Management, LLC (MMM), a media management company; Multi Media Enterprises, LLC (MME), an Internet and web design management company; and Prime Printing LLC (Prime Printing), a publishing company. All shared the same initial business address and resident agent.[83] All were incorporated in April 2009.[84] News Distributor, MME, MMM, and Prime Printing are owned by Phoenix International Investments LLC, which is wholly-owned by Roca and Wade Investors, LLC (Wade Investors).[85]

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[78] Roca credibly testified that he searched for alternative coverage in January and February 2009, but conceded that he was not concerned about working together with the Union on this issue—his priority was to keep the newspaper open. (Tr. 298, 303–304, 528, 1287–1289.)

[79] GC Exhs. 24–31, 33–34, 42.

[80] GC Exh. 15.

[81] I find it incredible that an unnamed investment group approached Roca about abandoning El Vocero and starting a new newspaper, yet El Vocero's board of directors convinced him to stay *and* agreed to let Roca work for the new newspaper. (Tr. 337–338, 1284, 1289–1290.)

[82] Roca provided vastly conflicting testimony as to when he first spoke to Sanchez about leaving El Vocero to run News Distributor. He initially testified that he offered the opportunity to Sanchez in early March, but later in the trial attempted to shift that date to mid-April. I credit the earlier version as consistent with the weight of the credible evidence. (Tr. 360–361, 1295–1296.) Sanchez was unsure as to when Roca actually offered him the position, but did not testify as to when Roca first discussed the concept with him. (Tr. 137, 162–163.)

[83] GC Exhs. 63–68.

[84] GC Exhs. 63–68.

[85] Roca's lack of knowledge as to the owners of Wade Investors was unremarkable until he professed to have no idea if Sanchez was a shareholder. (Tr. 325, 327–329, 380, 1011.) I found that testimony less than credible, given Roca's close working relationship with Sanchez and his reliance on him to assume responsibility for News Director.

News Distributor was incorporated and held its initial board of directors meeting on April 23.[86] Its stated business purpose was the distribution of newspapers and magazines produced by other companies.[87] News Distributor was registered with the business address of its resident agent, Peter Miller, Esq., El Vocero's counsel.[88] Its initial investment capital was $10,000 from Wade Investors.[89] The board of directors consisted of Roca, Stein, Pompadur, Alejandro Longo, and Paul Healy, Wade Investor's president. At the meeting, the board elected Roca as president, Sanchez as vice president and treasurer, and Jose Sepúlveda as secretary. The board resolved, among other matters, to solicit the distribution services of El Vocero, the San Juan Star, and Caribbean Business, a weekly periodical.[90] Roca served as president of News Distributor from April 29, 2009, until January 2010. [91] He was joined by Sanchez, who continued to be listed on El Vocero's masthead as its vice president of circulation until July 30, 2009.[92] Roca continues as president of La Prensa, Multi Services, MMM, MME, and Prime Printing.[93]

I. Roca Lays Groundwork for Elimination of the Circulation Department

As Roca prepared to launch the aforementioned companies, elimination of the circulation department continued to be Roca's preferred course of action.[94] By closing the

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[86] GC Exhs. 50, 67.

[87] There was no credible evidence that News Director distributed a significant amount of other newspapers and magazines for publishing companies other than El Vocero. (Tr. 12, 1632–1633, 1691.)

[88] GC Exh. 50.

[89] There is no testimony or evidence that either Roca or Phoenix International invested any money in News Distributor. (Tr. 328, 1019–1024.)

[90] GC Exh. 109.

[91] Roca testified that, during his tenure as president of News Distributor, his role was essentially a nominal one. (Tr. 227, 333–334, 1603–1606.) However, Roca's continued involvement in News Distributor's operations is evidenced by the fact that, until January 2010, his fax number at El Vocero served as News Distributor's fax number. (Tr. 169–170.) Aside from the involvement of Roca, Sanchez, and Martinez as El Vocero employees, there is no other evidence of direct involvement in News Distributor's affairs by El Vocero's management. (Tr. 397–401, 1692–1693.)

[92] GC Exh. 76.

[93] There was no indication as to whether La Prensa or MME had any relationship to News Distributor. (Tr. 274–276.)

[94] Roca testified that de Jesus advised him in late March or early April that they would need to lay off a substantial number of employees or close by April. However, no steps were taken to lay off anyone or close operations, and he allegedly "spent a good part of the end of April, beginning of May to look at the impact, the economic impact of that" and only then decided that "the best course of action would be to subcontract out the distribution of the newspaper." (Tr. 306–311, 1292–1294.) Moreover, de Jesús contradicted Roca's testimony by estimating a later point in time—the summer of 2009—as the point when El Vocero would have to close if it did not drastically reduce expenses. (Tr. 1117.) Roca also testified that he refrained from discussing the circulation department's closing with the Union in April–May 2009 because he was engrossed in dealing with El Vocero's economic difficulties at that time left him *and* the Union's bad-faith bargaining over the circulation department's reorganization in 2007–2008 indicated that further bargaining would be futile. (Tr. 1254–1256, 1322.) Roca's assertions to the contrary, the weight of the credible evidence supports a finding that he did not first decide to close the circulation department in late April, early or mid-May, but rather, in February when he

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circulation department, he expected El Vocero to save approximately $400,000 to $500,000 per month.[95] Unbeknownst to the Union, Roca was laying the groundwork for that objective by exhausting El Vocero's obligations within the collective-bargaining process. The first step in this endeavor was to inform the Union, by letter, dated April 15, 2009, that El Vocero intended to renegotiate the CBA. This letter did not make reference to the circulation department or any type of reorganization.[96] On April 23, 2009, Soto acknowledged receipt of Roca's request, responded that the Union was "working on our proposal of changes" and reminded him that "on March 9, 2009, and March 19, 2009, we requested to see the financial statement of the last six (6) months up to this moment; we have not had access to the same." He threatened to file an unlawful labor practice charge if such information was not received within 5 days. Finally, he added that the Union's proposals for changes to the CBA "may vary according to the proposal that we receive on behalf of the Company."[97]

Roca ignored the Union's request for financial information and proceeded to sidestep the Union. In June 2009, he held separate meetings with employees in each department. During these meetings, Roca informed employees that he would provide El Vocero's proposed collective agreement to each shop steward, and advised the employees to meet with their stewards to discuss El Vocero's proposal and provide feedback to the Union's bargaining committee. During his meeting with approximately six photo journalism department employees, Roca discussed the newspaper's predicament and the changes he was planning for the circulation department. Roca also informed the employees that he planned to establish three companies to handle El Vocero's administration, distribution, accounting, and payroll. One employee, Sebastian Marquez, raised the Union's likely opposition to any plan involving termination of the circulation department's employees. Roca responded that his negotiations with the Union would end up at the Labor Department, where they would be declared at an impasse. Marquez then asked Roca what he advised the employees to do. Roca recommended that, since he did not have good communication with the union leaders, the employees should approach the Union as a group and insist they be permitted to negotiate directly with him.[98]

By letter, dated June 11, 2009, El Vocero formally notified the Union of its intention to eliminate the circulation department, enclosed a proposed CBA, and offered to bargain over the "effects of this decision."[99] El Vocero also informed the Union that it had asked three companies to submit business proposals by June 19, 2009, to provide circulation services starting on June 29, 2009, and invited the Union to submit a proposal as a cooperative. The letter ended by confirming that the parties would begin negotiations at the Department of Labor on July 1 and 3, 2009.[100] On June 11, Roca also sent a letter to all 107 employees of the circulation department

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began working on creating companies to assume responsibility for the functions of the circulation department.

[95] Neither the General Counsel nor the Union challenged the accuracy of Roca's estimate. (Tr. 1293.)

[96] GC Exh. 61.

[97] GC Exh. 56.

[98] The specific and unwavering testimony of Geraldo Bello, who participated by speakerphone, and Marquez indicated that Roca's assertive role at the meetings sought to undercut the Union's role in effectuating the institutional change he sought. (Tr. 599, 602–604, 619–621.) Roca generally denied telling bargaining unit members that he wanted to bargain directly with them, but did not refute the specific allegations of Bello and Marquez. (Tr. 1759–1760.) Accordingly, I credit the testimony of Bello and Marquez over Roca's version.

[99] V. Exh. 21.

[100] GC Exh. 22.

informing them of their department's elimination and inviting them to create a cooperative of employees capable of competing for El Vocero's distribution by June 19, 2009.[101]

J. El Vocero's Selection of News Distributor

On June 15, 2009, El Vocero initiated a bidding process for the distribution, circulation, and collections functions of the newspaper commencing June 29. Proposals were due by June 19.[102] Five companies were invited to submit proposals, including News Distributor. Roca's letter to News Distributor was mailed to a post office box and addressed to Sanchez as its vice president of operations.[103] On the same day, the Union requested a delay in the bidding process. El Vocero acquiesced and Roca issued another letter to prospective bidders, dated June 17, 2009, extending the date to submit proposals to June 26, 2009, and informing them that distribution would start on July 6, 2009.[104]

Four companies submitted proposals: News Distributor, Island Wide Periodicals, Distribution Services Company, and Distribution Integration Services.[105] On June 29, Roca selected News Distributor, whose proposal, dated June 24, 2009, claimed that the company had experience in the distribution industry and was prepared to commence distribution.[106] In fact, at the time he submitted News Distributor's proposal, Sanchez was still employed by El Vocero and News Distributor was a company on paper only. It had no clients, employees, office space, or bank account. Its proposal did, however, include the lowest cost to perform the distribution and collections for the newspaper.[107]

Subsequent to the award of the contract to News Distributor, El Vocero retained a trucking company, TLC Logistics, Inc. (TLC), to deliver bundled newspapers to distribution agents in the far southern and western parts of the island. Distribution agents picked up the newspapers for the remaining areas. With the circulation department eliminated and News Distributor not prepared to commence distribution, El Vocero contracted with several other trucking companies to pick up and distribute the newspaper for several weeks. El Vocero employees continued to perform several functions previously performed by the circulation department: distributing the newspaper for prepaid accounts and courtesy copies; processing new subscriptions and cancellations; and bundling and wrapping, which was transferred to the production department. El Vocero's arrangement with TLC has continued through February 2010. Under News Distributor's operations, the newspaper is picked up at the press by independent contractors for distribution, with the exception of areas covered by TLC, prepaid accounts and courtesy copies. At the time of the hearing, News Distributor utilized approximately 24 independent contractors to deliver El Vocero. These entities or individuals

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[101] GC Exh. 23.

[102] GC Exhs. 3, 5.

[103] Given Roca's significant role in creating News Distributor, I did not find credible testimony by Sanchez and Roca that the latter was skeptical about News Distributor's ability to compete for the distribution work because it was still in the formative stages. (Tr. 218, 1296.)

[104] Testimony by Roca and Sanchez was uncertain on this point, but it appears that the Union was asking for more time to attempt to forestall the decision to close the department—not to submit a proposal. (Tr. 142, 1301–1304; V. Exhs. 24–25; GC Exh. 4.)

[105] V. Exhs. 6, 26–29.

[106] The correspondence between Roca and Sanchez constitutes the extent of the agreement. (GC Exh. 8; Tr. 90.)

[107] This finding is based on the testimony of Sanchez and Roca, as corroborated by the correspondence (Tr. 144–146, 218–219, 230, 1321; GC Exhs. 92, 122, 125; V. Exh. 30.)

delivered the newspaper themselves or utilized carriers do it on their behalf. They also performed collections on a weekly basis.[108]

Around the middle of June, while still El Vocero's vice president of circulation, Sanchez began the process of recruiting El Vocero staff to work at News Distributor. Sanchez' first hire was Martinez as News Distributor's operations manager. Both remained El Vocero employees as they proceeded to recruit distributors. Their meeting at a bookstore with distributing agent Jose Rivera revealed the strategy. Sanchez told Rivera that El Vocero planned to create a new newspaper focusing on law enforcement coverage and that a distribution company would be needed to distribute that newspaper, as well as other publications. Rivera was told that he would have an opportunity for greater earnings with the new distribution company and they asked him to have a follow-up meeting with Roca. Rivera met with Roca about a week later. Roca urged him to resign from El Vocero and operate his own company distributing and collecting in a specific territory. He would be awarded a contract by El Vocero and given $5000 in start-up funding for the business. Roca also told him that he would no longer deal with the Union and urged him to meet with El Vocero's area supervisor, Jose Fonseca, to sign an independent contractor agreement. The agreements were issued, and Rivera met with him at Plaza Las Americas, a shopping mall. When Rivera arrived at the food court, he saw Fonseca talking to a coworker, with another waiting. While Rivera waited his turn, he obtained a copy of the independent contractor agreement and reviewed it. When he finally got around to discuss the agreement with Rivera, Fonseca asked him to sign it. Rivera refused, insisting he needed more time to review the document and left. Three days later, Fonseca called Rivera about the contract and Rivera informed him that he was not signing it.[109]

K. Elimination of the Circulation Department

On June 15, 2009, the parties met at the Puerto Rico Department of Labor where El Vocero requested that the Union bargain over the effects of the decision. However, several union representatives were not available and the parties agreed to postpone the negotiations to July 1. On July 1, El Vocero and union representatives met, but could not agree on how to proceed. El Vocero's representatives declared they would not negotiate over their decision to close the circulation department, but were amenable to discuss the economic effects of that decision on bargaining unit members. The Union, on the other hand, wanted to negotiate the decision to close the circulation department, as well as a new CBA, and was not interested in simply discussing the effects of that decision. The parties met again on July 3, but their positions remained unchanged. On July 5 and 6, without first informing the Union, El Vocero representatives verbally notified the 107 bargaining unit members employed in the circulation department that they were terminated. Termination letters followed on July 6.[110]

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[108] De Jesus thought that El Vocero began to use TLC in July 2009. (Tr. 894.) However, the more certain testimony of Roca and Sanchez indicates TLC was picking up bundles at the press prior to that date. (GC Exh. 79; Tr. 103–106, 116, 121–124, 188, 192–194, 350–353, 837–838, 894.)

[109] Rivera's credible and unrefuted testimony established the process followed by Sanchez and Martinez in soliciting and processing the independent contractor agreements, as well the statements made to him by Roca. (Tr. 709–717, 719–722, 723, 728–732; GC Exhs. 77, 122.) Sanchez, on the other hand, provided only a general description of that process. (Tr. 60–68, 163–165.)

[110] Although Mendez' unrefuted testimony established that he was the first employee to receive a termination letter, it is not disputed that employees began receiving verbal notices on July 5. (Tr. 313–314, 401, 537–540, 651–655, 705, 742, 752, 755–756, 778, 1302, 1306, 1323–

Continued

Later that night, several union representatives and employees congregated outside El Vocero's press facility. After a while, Soto, Baez, and the Union's attorney entered the facility and spoke with Sanchez. They told him that the employees were there to work and distribute El Vocero. Sanchez said he would pass that along to Roca, but added that the newspaper's distribution had already been assigned to a company named News Distributor.[111]

L. Printing Press Employees Placed on Vacation

The production department consists of approximately 24 employees, including pressmen, pressmen's' aides, mechanics, and mechanics' helpers. As part of El Vocero's plan to reduce expenses, most of that department's employees were placed on involuntary leave on or around July 6. On that day, at Ortiz' direction, human resources' assistant, Wandi Gomilla,[112] placed dispatcher Luis Quintana on a 30-day involuntary vacation leave. On July 7, 2009, 12 other production employees were placed on involuntary vacations ranging from 11 to 14 days. Quintana's involuntary vacation, however, lasted 46 days.[113]

The involuntary leave directives, coinciding with layoffs in the circulation department, did not go over well. That evening, Quintana and other employees gathered outside the press facility from approximately 6:30 p.m. until midnight. During that time, Quintana observed Ortiz through the open loading bays as he operated the press machinery inside the facility.[114] During his 12-year tenure as press superintendent, Ortiz oversaw the work of the pressmen and pressmen's aides, but only performed their work whenever they needed assistance.[115]

M. Antonio Mendez' Bumping Rights

Antonio Mendez, an office clerk in the circulation department, was among the employees terminated on July 6, 2009. By letter to Maria Luisa Roca, dated August 12, 2009, Mendez

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1325, 1755; V. Exh. 31; GC Exh. 78.)

[111] This finding is based on Soto's credible and unrefuted testimony. (Tr. 540–542.)

[112] El Vocero denied in its answer that Wandi Gomila is a supervisor or agent. The testimony proved otherwise. Although Gomilla functioned as Maria Luisa Roca's assistant, she represented El Vocero in arbitration proceedings before the Puerto Rico Department of Labor. Gomilla also implemented departmental action by informing employees of changes in employment status. (Tr. 691, 756, 778.)

[113] I did not credit Roca's testimony that employees became anxious over the controversy and voluntarily requested leave time. (Tr. 315.) Press Superintendent Luis Ortíz confirmed Quintana's testimony that, at his direction, press employees were placed on involuntary vacation by the human resources department. (GC Exhs. 69–70, 110–121; Tr. 680–687, 1089–1090.)

[114] Ortiz, whose testimony focused on events on and after July 7, did not refute Quintana's detailed and credible testimony regarding his operation of the printing press on July 6. (Tr. 688–689, 697–699, 1093–1094.)

[115] I credited Quintana's testimony that it was not Ortiz' regular function to operate the printing press, although he occasionally assisted with bargaining unit work. (Tr. 689, 699.) Ortiz testified that he operated the printing press every day, but clarified that it is actually his responsibility to "oversee [his] employees to ensure that they perform their duties and they do so efficiently, in addition to having them use the equipment in the correct manner." He also conceded being continuously instructed by Gaspar Roca "let them deal with it [a]nd if they can't do it, then help them." (Tr. 1083–1085, 1094–1095.)

exercised his bumping rights under the CBA by requesting appointment to any of three positions: proof reader; classified office clerk; and pressman helper. Mendez had the requisite seniority for the position and, with a Bachelor's Degree in business administration, was qualified to perform the work. In a letter, dated August 25, Maria Luisa Roca denied Mendez' bumping request on the ground that his position was eliminated after the CBA expired. Mendez responded in a letter, dated August 31, insisting (1) that his bumping rights remained valid even after the CBA expired and (2) that Local Law 80 required employers to give preference to employees for vacant positions based on seniority.[116]

N. MMM's Assumption of El Vocero's Administrative and Other Functions

MMM, with Roca as president, began operating the first week of July 2009 from El Vocero's facilities, with 24 former El Vocero employees, and funded primarily by El Vocero. All 24 were former El Vocero employees in the administration, accounting, classified, and management departments, and continued performing essentially the same functions they had at El Vocero. MMM's employees included: human resources Assistant Wandi Gomilla; accountants Jose Muñoz, Marisol Ramos, and Miguel Capjohn; Credit Manager Jose Sepulveda; cashier Jose Lopez; and information technologist Rodrigo Mella.[117] El Vocero and News Distributor were and continue to be MMM's only clients. Neither El Vocero nor News Distributor has ever paid the agreed upon monthly service fee to MMM.[118] Nor has MMM ever paid rent for the office space it continues to use at El Vocero's facility.[119] Neither de Jesus nor Munoz knew the amount owed by MMM to El Vocero.

In conjunction with its initiation of the bidding process for the circulation department's work on June 15, 2009, El Vocero arranged to transfer portions of its accounting, payroll, human resources, data entry, security, purchasing, and maintenance operations to MMM for a monthly service fee of $20,000. De Jesus signed the agreement on behalf of El Vocero; Jose Sepulveda signed it on behalf of MMM. MMM's address was listed as a post office box.[120] On the same day, News Distributor entered into a virtually identical agreement with MMM for the latter to manage its payroll, accounting, and human resources operations for a monthly service fee of $15,000. That agreement was executed by Sanchez on behalf of News Distributor and Sepulveda, also a News Distributor officer, on behalf of MMM. No address was provided for News Distributor.[121]

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[116] El Vocero did not refute Mendez' contention that he was otherwise qualified and entitled to bump up to any or all of the three listed positions. (Tr. 755–760; GC Exhs. 73–75.)

[117] These findings are based on testimony by Sanchez, Roca, de Jesus and Munoz regarding the functions of MMM and the previous functions performed by its employees at El Vocero. (Tr. 68–70, 266–271, 274–276, 282–284, 379, 832–834, 859–864, 919–927, 930–938, 942–944; GC Exhs. 98, 122–123, 126.)

[118] I did not credit de Jesus' assertion that MMM charges its service fee to El Vocero by offsetting the amounts owed from the cash advances, as no documentation was produced to corroborate such offsets. (Tr. 865–870.) Nor was Munoz, a person in a position to know that at MMM, aware of such payments. (Tr. 948.)

[119] Notwithstanding de Jesus' testimony that MMM was obligated to pay rent to El Vocero, there was no written agreement to that effect and rent has never been paid. (Tr. 865, 897–898.) Again, Munoz was unaware of any such payments. (Tr. 945–946, 868–870, 950–953; GC Exhs. 81–82, 86.)

[120] GC Exh. 87.

[121] GC Exh. 88.

O. News Distributor's Assistance from El Vocero

Employees laid off from El Vocero's circulation department were on the payroll until July 13, 2009.[122] On July 14, Sanchez, on behalf of News Distributor, entered into employment agreements with 12 of those former employees. Sanchez hired five more former El Vocero employees in September.[123] In addition to employing former El Vocero employees, News Distributor also contracted former El Vocero employees as microentrepreneurs. As of March 2010, News Distributor utilized 4 "microbusinesses" and 16 individuals as independent contractors. The contact person for eight of the independent contractors was previously employed by El Vocero as union employees in the circulation department. Moreover, 11 of the independent contractors signed their agreements between June 1 and 16, 2009.[124]

El Vocero's connection to News Distributor did not end with the movement of personnel. In order to assist News Distributor become operational, El Vocero provided the new company with computers and related software, office equipment, and furniture. News Distributor eventually paid $9,338.19 to El Vocero, but most of the equipment and furniture was provided for free. In addition, from July 1 through December 31, 2009, El Vocero provided News Distributor with free advertising soliciting independent distributors and newspaper carriers. The contact information in the ads directed interested persons to call El Vocero's customer service department or specifically listed El Vocero's area supervisors.[125]

In addition, since July 2009 and continuing through at least January 2010, El Vocero has transferred money to News Distributor. On July 7, 2009, Roca directed de Jesus to extend a $90,000 "cash advance (line of credit)" to MMM on behalf of News Distributor at 8-percent interest.[126] In August 2009, El Vocero made cash advances totaling $654,201.01 to MMM on behalf of News Distributor, while MMM transferred $20,751.12 to El Vocero.[127] In September 2009, El Vocero transferred $787,395.45 to MMM on behalf of News Distributor, while MMM transferred $15,009.17 to El Vocero.[128] News Distributor's general ledger reflects that El Vocero transferred $88,030.53 to it in October 2009, while News Distributor transferred $5,000.22 to El Vocero.[129] In November 2009,[130] El Vocero transferred $703,622.49 to MMM, while MMM transferred $155,836.37 to El Vocero.[131] In December, El Vocero advanced News Distributor

[122] GC Exh. 123.

[123] GC Exh. 126.

[124] See stipulation by the parties. (Tr. 1047–1049.)

[125] Approximately 40 percent of News Distributor's office furniture and equipment, and 15 percent of its total value, was purchased from El Vocero. (GC Exhs. 76(b)–(g), 90; Tr. 50, 52, 54, 150–151, 171–172, 184–1185, 226, 362, 799–805, 1639–1641, 1644, 1758–1759.)

[126] Roca issued two identical instructions to de Jesus, except that one was for MMM and the other was for News Distributor (GC Exhs. 81–82, 92.)

[127] The debits are listed at entries on August 5–7, 11, 13–14, 17, 19–21, 25, and 27–28; the credits totaling $20,751.12 are listed at entries on August 28. (GC Exh. 83.)

[128] See debits listed at entries for September 1–4, 8–11, 15–18, 22–25, 28, and 30; a $15,009.17 credit is listed in an entry on September 17. (GC Exh. 84.)

[129] News Distributor's general ledger does not nearly reflect the entries recorded in El Vocero's bank records, but it is the only record of transactions in October. (GC Exh. 17.)

[130] The dates in the first column, which appear to refer numerically to January, were obviously partially cut off since the statement has an ending date of November 30. (GC Exh. 85.)

[131] The debits are listed at entries for November 3, 5–6, 9–10, 12–13, 16, 18, 20, 23, 25, 27, and 30; the credit entries are listed at November 18, 20, 25, and 27. (GC Exh. 85.)

$60,000.45, while News Distributor transferred back $104,024.41. In January 2010, News Distributor transferred $90,000.13 to El Vocero, while receiving an advance of $30,000.15. There was no scheduled payment plan and, according to News Distributor's general ledger, it continued to owe money to El Vocero until January 13, 2010, when it overpaid the balance due by about $38,000.[132]

El Vocero also kept the new employees at News Distributor and MMM covered by its medical insurance plan, MCS. MCS charges El Vocero the total amount of health insurance expenses owed for all employees included in the plan. Although El Vocero charges MMM for that expense, that amount has never been paid.[133]

Finally, although Field's travel expenses in December 2009 were paid by News Distributor, his January travel and lodging in Puerto Rico were paid by El Vocero.[134]

III. Legal Analysis

The General Counsel and the Charging Party allege a series of 8(a)(5) and (1) violations by El Vocero and News Distributor resulting from El Vocero's alleged unilateral changes to bargaining unit members' terms and conditions of employment. El Vocero contends that its unilateral actions were justified due to the Union's failure to bargain in good faith and a myriad of external, extraordinary, unforeseen economic factors beyond its control: the economic recession that began in 2008 and the accompanying nationwide decline of the newspaper industry; a mounting operating deficit; and inability to pay suppliers.

A. El Vocero's Breach of the December 26, 2008 Agreement

An employer is generally prohibited from implementing unilateral changes to mandatory subjects of bargaining without first bargaining with the union to impasse. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Winn-Dixie Stores*, 243 NLRB 972 (1979); *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); *RBE Electronics of S.D.,* 320 NLRB 80 (1995). Thus, the implementation of such a change without the consent of the other party to collective-bargaining agreement constitutes an 8(a)(5) violation. *Navigator Communications Systems, LLC.*, 331 NLRB 1056 (2000).

The December 26 Agreement essentially provided El Vocero with a second chance to comply with the terms and conditions of the CBA that it had otherwise breached in numerous respects up to that point. El Vocero did not counter the evidence that it breached the terms of

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[132] De Jesus referred to the payments by El Vocero to News Distributor as cash advances, but his lack of knowledge as to the total amount transferred, as well as any repayment arrangement indicates the existence of a loan. (Tr. 873–874, 878, 883–884, 890, 893, 908, 959, 1725; GC Exh. 17.) Moreover, Fields testified that approximately $32,000 of a $38,130.60 overpayment by News Distributor in January 2010 was attributable to the interest on the money advanced by El Vocero. Due to the absence of any documentation as to that entry, I did not credit Fields' contention. (GC Exh. 17; Tr.1702–1706.)

[133] Contrary to de Jesus' testimony that El Vocero charges back the cost of News Distributor to MMM, that cost has never been reimbursed by either MMM or News Distributors. (Tr. 79, 304, 857–858, 859, 1739.)

[134] Given the extensive amount of time elapsed, Fields' assertion on April 14, 2010, that News Distributor was going to reimburse El Vocero for paying his January 2010 moving expenses to Puerto Rico was not credible. (Tr. 1629–1632, 1728; GC Exhs. 104–106.)

the December 26 Agreement by failing to contribute, commencing January 2009, to the cancer plan, intensive care plan, life insurance, funeral insurance, long-term disability insurance, pension plan, and the gasoline allowance. Nor did it offer evidence that it notified the Union before reneging on the agreement and asked to bargain regarding the difficulties in complying with the agreement. Roca gave a vague and unconvincing explanation as to a worsened financial picture that developed some time between the execution of the December 26 Agreement and his return from vacation in January 2009. He also alluded to difficulties that developed in getting the coverages reinstated, yet he never informed the Union of those issues and insisted he was too busy running the newspaper. In retrospect, it is evident that El Vocero never had any intention of complying with the December 26 Agreement and was simply stringing along the Union in order to prolong its noncompliance with CBA-mandated obligations—at that point, over a year.

El Vocero's failure to comply with the December 26 Agreement "is not excused either by subjective good faith or by the economic necessity of maintaining viability of an employer's operation and preserving the jobs of the employees in the bargaining unit." See *Dahl Fish Co*., 279 NLRB 1084, 1094–1095 (1986), citing *Oak Cliff-Golman Baking Co.,* 207 NLRB 1063, 1064 (1973), affd. 505 F.2d 1302 (5th Cir. 1974), and *Rego Park Nursing Home*, 230 NLRB 725, 727 (1977). Having asserted a financial inability to comply, El Vocero was required to request bargaining regarding its dilemma and, upon the Union's request, substantiate its claim by providing the Union with the appropriate financial information. *Stella Doro Biscuit Co.,* 355 NLRB No. 158, slip op. at 2, WL 3446122 (2010), citing *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), and *Nielsen Lithographing Co*., 305 NLRB 697 (1991). Based on the foregoing, El Vocero violated Section 8(a)(5) and (1) of the Act.

B. Employees Pay Dates, Severance Pay, Vacation, Medical Insurance and Bumping Rights

The General Counsel and the Charging Party also allege that El Vocero made unilateral changes to employees' terms and conditions of employment by failing to provide severance and vacation pay; changing employees' medical insurance provider; failing to honor a laid-off employee's bumping request; and failing to pay employees on Thursdays. Again, El Vocero did offer evidence to refute the allegations, but attributed its actions to financial necessity or the expiration of the CBA.

Generally, an employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 742–43 (1962); *Pepsi-Cola Bottling Co.,* 330 NLRB 900 (2000); *Daily News of Los Angeles,* 315 NLRB 1236, 1237 (1994). The CBA, in pertinent part, specifically provided employees with the following benefits: lump-sum payments to laid-off employees of 2 weeks of severance for each year of service, which El Vocero previously modified to a series of $500 monthly payments; the right to take accrued vacation leave based on seniority, subject to a departmental limitation of two employees on vacation at a time; the right to select their medical insurance provider with a $317 monthly contribution by El Vocero; and the right of laid-off employees to bump less senior employees from available positions. Moreover, although there was no evidence that the CBA set forth a scheduled weekly payday, the undisputed testimony established that El Vocero paid its employees every Thursday.

On May 13, 2009, without prior notification to, and bargaining with, the Union, El Vocero reduced severance payments to $250 per week. On June 30, 2009, El Vocero changed the employee medical plan from MAPFRE to MCS, effective July 1, 2009, and reduced its employer contribution to $213 per month per employee. Again, El Vocero took such action without discussing it with the Union. On July 6 and 7, 2009, El Vocero placed 13 printing press employees on involuntary vacation. None requested the leave and some, including Quintana, showed up attempting to work. On August 25, 2009, El Vocero rejected Mendez' bumping request to several positions for which he was qualified because the CBA expired. Lastly, on numerous occasions between January and July 2009, El Vocero failed to pay employees on time, with delays ranging from several days to a week. The Union voiced its objection on numerous occasions, but to no avail.

The foregoing changes affected employee terms and conditions of employment and were, thus, mandatory subjects of bargaining. See *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) (health insurance); *Desert Toyota*, 346 NLRB 132 (2005) citing *Abernathy Excavating, Inc*, 313 NLRB 68 (1993) (regularly scheduled pay dates); *Migali Industries,* 285 NLRB 820, 825–826 (1987) (vacation scheduling); *E. I. du Pont & Co.*, 346 NLRB 553, 579 (2006) (severance pay); *Associated Services for the Blind*, 299 NLRB 1150, 1151 (1990) (bumping rights). Moreover, severance pay, as a contractual provision relating to seniority rights, survived the CBA's expiration, and remained subject to bargaining. *Concourse Nursing Home,* 328 NLRB 692, 702 (1999); *MBC Headwear, Inc.,* 315 NLRB 424 fn. 3 (1994); *Kuna Meat Co.,* 304 NLRB 1005, 1012 (1991), enfd. 966 F.2d 428 (8th Cir. 1992); and *Hen House Market No. 3,* 175 NLRB 596, 602 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Accordingly, by changing or refusing to honor the aforementioned contractual rights without first giving employees an opportunity to bargain, El Vocero violated Section 8(a)(5) and (1).

C. *Closure of the Circulation Department and Contracting Its Work to a New Distributor*

The General Counsel contends that El Vocero closed the circulation department and laid off its 107 employees on July 6, 2009, without bargaining with the Union to impasse and, in an attempt to avoid its obligations under the CBA, entered into a contract with a newly-formed company, News Distributor, for the performance of that work. Furthermore, the General Counsel avers that there is an alter ego relationship between El Vocero and News Distributor. El Vocero and News Distributor deny the allegations and assert that the latter was an independent concept advanced by Roca in order to pursue financial opportunities in the distribution industry. El Vocero also contends that it was justified in closing the circulation department because: (1) the Union's bad faith precluded any possibility of reaching an agreement; and (2) economic exigency required the immediate closure of the circulation department.

1. Failure to bargain to impasse

El Vocero essentially contends that it reached an impasse with the Union because the latter never made any proposals and bargained in bad faith during meetings to reorganize the circulation department in 2007 and 2008, and it would have been futile to attempt to do so again in 2009. As evidence of such bad faith, El Vocero also relies on evidence of the Union's support for another newspaper, The Daily Sun, and its opposition of a government grant for News Distributor.

As previously explained, an employer cannot unilaterally change a mandatory subject of bargaining without first notifying the Union and giving the Union an opportunity to bargain over those changes. See *NLRB v. Katz*, 369 U.S. at 742–743. An employer has "a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). The Board recently addressed impasse in *Area Trade Bindery Co.*, 352 NLRB 172, 175 (2008):

> By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 543 (1988). . . . "A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973).

Factors to consider when determining whether or not an impasse exists include, "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of the negotiations." *Taft Broadcasting Co., 163 NLRB 475, 478 (1967)*, enfd. sub. nom. *Television Artists AFTRA*, 395 F.2d 622 (D.C. Cir. 1968). The party asserting impasse as a defense to unilateral action bears the burden of proof on the issue. *North Star Steel Co*., 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992).

In order to conclude that the Union failed to act in good faith during the negotiations leading up to July 2009, the Union's conduct must be determined to have been so egregious as to "preclude the existence of a situation in which [El Vocero's] own good faith could not be tested." *Times Publishing Co*., 72 NLRB 676, 683 (1947); see also *Continental Nut Co*., 193 NLRB 841, 858 (1972); *Northwest Pipe & Casing Co*., 300 NLRB 726, 737 (1990).

The parties met on numerous occasions in 2007 and 2008 to discuss Roca's proposal to reorganize the circulation department by reassigning much of the distribution work from unit members to independent contractors. On several occasions, the Union permitted Roca to make presentations to the union membership. Roca and Baez conceded at trial that they were there to listen and not make proposals. However, each of Roca's proposals reflected feedback from the union delegates and employees after meetings with Roca. Initially, El Vocero proposed to reorganize the circulation department by replacing distribution agents with independent contractors responsible for larger distribution zones. The first proposal was rejected by a controlling half of the union membership in February 2008. The parties continued their discussions and a vote over a second proposal in May or June 2008 also failed, reflecting the concerns of metropolitan area agents over the smaller size of their distribution areas. Subsequent concerns by the membership reflected the concerns of the inland area agents as to the proposed changes in their distribution areas. Roca subsequently attended a union membership meeting and addressed employees' concerns over the effects that reorganization would have on other departments as well.

Clearly, Roca and the union leadership had more work ahead before being able to gain the approval of a preponderance of the membership. However, there were no further discussions regarding a proposed reorganization of the circulation department after the spring of 2008. More importantly, there was never any mention by El Vocero that it sought to eliminate the circulation department. Therefore, there could not have been an impasse on that issue.

As to the alleged futility in even discussing the circulation department's closing, the Union's actions and stances during the attempted reorganization efforts by El Vocero in 2007 and 2008 could hardly be called egregious. For sure, the Union took a hard line in insisting on El

Vocero's adherence to employees' rights under the CBA. However, there was also an abundant history of economic concessions by the Union during that period of time, as evidenced by the December 26 Agreement, deferred and/or excused payments to employees' 401(k) funds, and foregoing wage increases.

The evidence established direct and indirect support by Soto, Baez, the Union, and the TNG/CWA for the efforts of former San Juan Star employees in forming a workers' cooperative, the Cooperativa Prensa Unida. That cooperative operates The Daily Sun, a daily English-language newspaper. The TNG/CWA donated money to the cooperative, the Union provided free office and meeting space, and Baez personally loaned the organization money. Moreover, Soto advocated for government funding to the cooperative, while opposing such funding for News Distributor. It is difficult, however, to imagine how their efforts were detrimental to El Vocero. Besides helping laid-off union members at the San Juan Star obtain work through the formation of a cooperative, they had no direct impact on El Vocero—there was certainly no evidence that spawning an English-language newspaper would diminish the circulation of El Vocero, a Spanish-language daily newspaper. News Distributor, on the other hand, was a distributor and, according to El Vocero, a separate entity. Thus, Soto's advocacy against it getting government funding cannot be deemed inimical to El Vocero.

2. Contracting the work to News Distributor

Interrelated with the unilateral change involved in closing the circulation department was the act of contracting its work to News Distributor. On June 11, 2009, Roca provided the Union with a proposed CBA, which included the elimination of that department. He informed the Union, however, that although he was willing to negotiate the effects of his decision to shift such work to another company, the decision itself was final and not subject to negotiation. Over the Union's objections and attempts to negotiate the closure decision, Roca remained steadfast and awarded the distribution work to newly-created News Distributor 2-1/2 weeks later.

On July 6, less than a month after Roca notified the Union of his decision, News Distributor commenced distribution of El Vocero, with Roca as president, Sanchez as vice president, and Martinez as operations manager. It was, by all accounts, a company on paper only. Its 14 employees remained El Vocero employees until July 13, operated out of El Vocero's offices, and essentially continued performing their former duties. The billing and collections functions remained essentially the same, with independent contractors replacing distribution agents. The only difference was El Vocero's contracting with TLC to deliver newspapers to independent contractors in the western and southeastern zones. Thus, it is clear that when El Vocero contracted out the work of the circulation department to News Distributor, its basic operation remained the same.

El Vocero was not changing the scope, nature, or direction of its business but, rather, shifting an integral component of its operations to another company. "Contracting bargaining unit work under such circumstances by substituting one group of workers for another to perform the same work is clearly a mandatory subject of bargaining." *American Benefit Corp.,* 354 NLRB No. 129, slip op. at 13 (2010), citing *Fibreboard Paper Products Corp*., 379 U.S. 203 (1964)[135]

[135] As noted at fn. 8 of the *Fibreboard* decision, the "terms 'contracting out' and 'subcontracting' have no precise meaning" and "are used to describe a variety of business arrangements" from those involved in the case. In the case of News Distributor, the General Counsel alludes to it as a subcontractor. However, the facts in this case indicate that El Vocero directly contracted with News Distributor, who then subcontracted with independent contractors.

and *Spurlino Materials, Inc.,* 353 NLRB 1198, 1217 (2009). In *Fibreboard*, the employer actually conceded in a letter to the union that it was contracting out bargaining unit work, in contrast to El Vocero's attempt to disguise its contract with News Distributor as a change in the direction of the business.

Reliance by El Vocero and News Distributor on *First National Maintenance Corp.*, 452 U.S. 666, 681–682 (1981), is unavailing. In that case, an employer's decision to partially close the business was found not to be a mandatory subject of bargaining, although there remained a duty to bargain over its effects. The contrast to *Fireboard* is obvious as the employer in *First National* neither replaced the discharged employees nor contracted out their functions to another company.

Based on the foregoing, it has been established that El Vocero's decision to contract out the circulation department's unit work to News Distributor was a mandatory subject of bargaining. Furthermore, the undisputed evidence established that El Vocero neither notified the Union nor afforded it an opportunity to bargain over that decision. Those actions violated Section 8(a)(5) of the Act.

3. Claim of economic exigencies

Having failed to bargain to impasse before invoking unilateral changes, El Vocero contends that an employer, under certain circumstances, could be justified in making unilateral changes to mandatory subjects of bargaining. The Supreme Court vaguely mentioned such an exception in *NLRB v. Katz*, 369 U.S. 736, 741–742, 747–748 (1982), but upheld the employer's violation based on unilateral changes in wage and sick leave policies after it incorrectly claimed an impasse in negotiations. In the seminal Board decisions that followed, it became clear that employers would not be justified in implementing unilateral changes simply because of economic difficulties. See *Winn-Dixie Stores*, 243 NLRB 972, 974–975 (1979) (unilateral wage increase in order to remain competitive in its industry); *Bottom Line*, 302 NLRB 373, 373–375 (1991) (employer's suspension of contributions to union trust funds during bargaining); *RBE Electronics of S.D.*, 320 NLRB 80, 82 (1995) (employer recalled employees and then unilaterally reduced their work hours due to a vaguely defined business downturn). In *RBE*, the Board also noted that an employer claiming justification for unilateral action on the basis of an economic exigency must meet a heavy burden of proof that it experienced a business emergency requiring it to make unilateral changes. A compelling business justification was defined as an external, extraordinary, unforeseen, and not reasonably foreseeable occurrence beyond the employer's control that has a major economic impact and requires the employer to take immediate action. Id., quoting *Hankins Lumber Co*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987).

Contrary to El Vocero's assertions, the credible evidence did not point toward closure of the newspaper by July 2009. El Vocero's difficulties—which included losses and debts of over $64 million, diminished advertising revenue, and periodic difficulties in purchasing paper from a supplier—seem more formidable than the need to maintain competitive wages and the vague business downturn cited by the employers in *Winn-Dixie* and *RBE*, respectively, as reasons for taking unilateral action. 320 NLRB at 84–85; 243 NLRB at 973–974. However, the credible evidence reveals that El Vocero's financial situation was improving—albeit slightly—when the Company announced its decision to close the circulation department in July 2009. Prior to that time, El Vocero transferred 38 employees to Multi-Media Management and News Distributor, which received government assistance in covering their payroll costs. El Vocero also transferred some employees to Multi-Media Enterprises, Multi-Service, and Prime Printing. By July 2009, El Vocero seemed to have found a way to fund its payroll, thereby alleviating a portion of the

Company's financial stress. El Vocero also agreed to a payment plan with its paper supplier and began the process of establishing a payment schedule for its tax arrears by July. The only circumstance that seems to have changed prior to July 9 was the loss of the government funding that El Vocero had used to meet its payroll demands from 2005 through 2007. Additionally, El Vocero hired an industry consultant in January 2008, and began compensating Maria Luisa Roca for benefits accrued by the late Gaspar Roca's at a rate of $10,000 per month.

Given the significant savings that resulted from contracting out the circulation department's functions, there is no doubt that El Vocero exercised rational business judgment in seeking to eliminate that department and contract its work to another company. Whether the facts surrounding El Vocero's actions rise to the level of a *compelling* business justification, however, depends on the necessity of prompt employer action. In *RBE*, 320 NLRB at 82, the Board held that a business emergency that exempts an employer from the prohibition on unilateral changes to mandatory bargaining subjects must be an external, extraordinary, unforeseen, and not reasonably foreseeable occurrence beyond the employer's control that has a major economic impact and requires the employer to take immediate action. This record is devoid of any evidence demonstrating any external, extraordinary, or unforeseen occurrence prior to July 2009.

It is also notable that El Vocero announced its decision approximately 5 months after it was made and approximately 3 months after Roca claimed the newspaper was likely to close if it did not significantly reduce its cost. The delay, the inconsistency between the dates when El Vocero projected it would reach a financial crisis point and it closed the circulation department, as well as the Company's financial improvements in advance of the closure announcement, strongly indicate the lack of a compelling business justification for closing that department on July 9, 2009.

El Vocero cites several cases in which the Board sanctioned unilateral employer action based on exigent circumstances.[136] In all but one of the cases cited, however, the terminated functions of the bargaining unit members were not replaced by another company. In *Seaport Printing & Ad Specialties, Inc.,* 589 F.3d 812 (5th Cir. 2009); 351 NLRB 1269, 1270 (2007), the employer closed its facility in response to a mandatory evacuation in advance of a hurricane—an unforeseen and economically consequential event clearly requiring prompt employer action. In *Brooks-Scanlon, Inc*., 246 NLRB 476, 476–477 (1979), the diminished availability of timber in the area justified the employer's unilateral decision to cease lumber milling operations, In *Raskin Packing Co.*, 246 NLRB 78, 82–84 (1979), a meat packing company closed its business after it ran out of all options—the U.S. Department of Agriculture informed the employer that it was violating the law by operating without a performance bond and the employer was unable to obtain one after its bank discontinued its line of credit. In *M & M Transportation Co.*, 239 NLRB 73, 74–75 (1978), the employer was unable to obtain a loan and had no funds to continue operating. Similarly, in *National Terminal Baking Corp.*, 190 NLRB 465, 466 (1971), the employer ceased operations after two of its delivery trucks were stolen in 1 week and it lacked the funds to continue operating. In *Kingwood Mining Co.*, 210 NLRB 844, 844–845 (1974), affd. sub nom. *Mine Workers v. NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), the employer discontinued its mining operation after it lost a contract representing over one-third of its mining business.

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136 El Vocero also cites *Visiting Nurse Service v. NLRB*, 177 F.3d 52, 55–57, 62 (1st Cir. 1999), but the Board rejected the employer's assertion that "operational and economic realities" rose to the requisite level of economic exigency.

In *Central Rufina* 161 NLRB 696, 697–699 (1966), the Board approved the employer's temporary discontinuation of its sugar cane grinding operation for the grinding season and contracted out the work due to mechanical difficulties with its equipment. Those unforeseen developments, however, are distinguishable from the circumstances in this case. El Vocero was not faced with a sudden problem in producing or distributing its product. Its staff, equipment, and machinery were all intact and, with all of its operational issues, El Vocero was always able to produce and distribute a daily newspaper.

In contrast to the examples of exigent circumstances cited above, the weight of the credible evidence indicates that El Vocero would not have gone out of business had the circulation department remained open. The business had been hemorrhaging money for years, especially since its ill-fated purchase of the El Mundo newspaper, but always managed to keep moving along. Yet, Roca decided about 5 months earlier, during the pendency of the CBA, to close the circulation department. At that point, he was planning to create News Distributor and several other companies in order to pursue distribution opportunities in the publication industry. This background is hardly indicative of imminent financial collapse. Indeed, El Vocero's financial situation showed signs of improvement before it closed the circulation department. El Vocero had transferred several employees and obtained government support for their wages; developed a payment plan with its paper supplier; begun to pay its back taxes; hired a new consultant; and started to compensate Maria Luisa Roca for Gaspar Roca's accrued vacation at a rate of $10,000 per month, all in the year preceding the elimination of the circulation department. In contrast to *Brooks-Scanlon, Inc*., supra, there was a history of responsiveness on the Union's part after employees were laid off in 2008, resulting in the December 26 Agreement. Most importantly, El Vocero never requested that the Union negotiate over the closing of the circulation department before making the irreversible decision to do that.

Based on the foregoing, El Vocero's unilateral closure of its circulation department does not meet the Board's criteria for an economic exigency exception from the prohibition of unilateral changes to mandatory bargaining subjects. As El Vocero had the time to bargain with the Union over the closure of the circulation department, its failure to bargain to impasse before doing so constitutes a violation of Section 8(a)(5). Thus, El Vocero violated Section 8(a)(5) of the Act when it unilaterally contracted out the work of the circulation department without bargaining with the Union or in the alternative created News Distributor as an alter ego to distribute the newspaper and discharged the circulation department unit employees as a result of their unlawful actions.

4. Alter ego and single employer relationships

The General Counsel and the Charging Party contend that El Vocero is in an alter ego relationship with News Distributor, which was created in order to enable El Vocero to circumvent its obligations under the Act. The General Counsel also asserts that both companies are so intertwined that they constitute a single-employer. El Vocero and News Distributor deny those contentions and insist that the latter is an autonomous entity serving several other publications, as well as El Vocero.

The alter ego doctrine generally applies where a nonunion company replaces a union company. The single employer doctrine, on the other hand, generally applies to companies that concurrently perform the same or similar function, and where one company recognizes the union and the other does not. *Stardyne, Inc. v. NLRB,* 41 F.3d 141, 152 (3d Cir. 1994); *NLRB v. Hospital San Rafael,* 42 F.3d 45 (1st Cir. 1994). Given the fact that the Union disputes the legitimacy of News Distributor's existence and has not even sought its recognition, the alter ego theory is more applicable in the circumstances. Regardless, the elements necessary to prove alter ego, except for motive, are relevant in proving the existence of single-employer status. *Diverse Steel, Inc*. 349 NLRB 946, 951 (2007).

The key elements in establishing an alter ego relationship are "substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership." *NLRB v. Al Bryant, Inc.,* 711 F.2d 543, 553–554 (3d Cir. 1993), cert. denied 464 U.S. 1039 (1984). Another significant factor is whether the new entity was created for the purpose of evading collective-bargaining obligations. See *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). However, no single factor is determinative and the Board does not require the presence of each factor to conclude that alter ego status should be applied. See *Stardyne, Inc.*, 41 F.3d at 146, citing *Fugazy Continental Corp.,* 265 NLRB at 1301; *Standard Commercial Cartage, Inc.*, 330 NLRB 11, 13 (1999); *MIS, Inc.,* 289 NLRB 491, 492 (1988).

Applying traditional alter ego analysis to the El Vocero-News Distributor relationship, there is little doubt that the two entities have substantially identical ownership, management, supervision, business purposes, operations, equipment and premises, and customers. News Distributor, bestowed with a mere $10,000 in start-up capital, is owned by Phoenix International and Wade Investors. Phoenix International is owned by Roca, who also happened to sign the membership certificate of Wade Investments. Stein and Pompadur are on the boards of directors of both El Vocero and News Distributor; Roca remains a board member of the latter. Roca served as president of both El Vocero and News Distributor for at least 10 months before formally passing the reins of the latter to his handpicked replacement, Fields; Sanchez and Martinez assumed the key roles of executive vice president and operations manager of News Distributor while still employees at El Vocero. All of News Distributor's initial managers moved over from El Vocero's circulation department.

Until July 2009, El Vocero's business purpose, the publication of a daily newspaper, had always included its distribution to its customers. It transferred portions of that function to News Distributor, but retained the dispatching and bundling work, and the distribution of prepaid subscriptions and courtesy newspapers. With the exception of distribution agents being replaced by independent contractors, the distribution of El Vocero to its customer base has not changed. News Distributor's business purpose, on the other hand, has always entailed the distribution of El Vocero to the same customer base. Indeed, the transfer of those functions to News Distributor was a culmination of Roca's 2-year long effort to reorganize the circulation department. News Distributor had no other clients when it inherited that distribution function. Its creation at a time when Roca was extremely occupied with El Vocero's operations, as well as a few months before the CBA expired, was purely strategic. Moreover, News Distributor's revenue from El Vocero continues to dwarf the revenue received from several other publications. Such circumstances strongly suggest an alter ego connection where, as here, a portion of a company's business is transferred to the new company. See, e.g. *Stardyne, Inc*., 313 NLRB 170 (1993), citing also *Standard Commercial Cartage Inc*., 330 NLRB 11 at 14 (1999), and *Eckert Fire Protection*, 332 NLRB 198, 201 (2000).

The management and supervision of El Vocero's former circulation department and News Distributor were virtually identical at the outset. All of News Distributor's managers were former El Vocero employees until July 13, 2009. Roca, Sanchez, and Martinez, while employed by El Vocero, administered News Distributor's main operations. Roca issued the employment letters to new staff, obtained the start-up capital from local government, and recruited his permanent replacement with El Vocero funds. Roca continued to serve as News Distributor's president until January 2010 when News Distributor finally enacted its own policies and procedures. In addition, El Vocero and News Distributor use the same bank, outside accountants, and attorney.

During its first year of existence, News Distributor, undercapitalized, has been almost entirely dependent on the continuous transfer of funds and in-kind contributions from El Vocero. The funds transfers were effectuated by Munoz without documentation or prior approval by de Jesus. El Vocero also provided News Distributor with rent-free office space, equipment, and supplies until the end of August 2009. Similarly, when News Distributor moved its operations out of El Vocero's offices, the latter provided it with most or all of its office equipment and furniture from the former circulation department. El Vocero provided News Distributors with free advertising for carriers throughout 2009. In addition, El Vocero pays one invoice for the employees' medical plans at El Vocero and News Distributor. However, there was no documentary evidence that News Distributor reimburses El Vocero for its portion of the coverage.

The operations of El Vocero and News Distributor have also been closely linked though two other Roca-created and funded entities, MMM and Prime Printing. MMM's only other clients are MME, Multi-Services, and Prime Printing—all associated with Roca. Since July 2009, MMM, operating rent free out of El Vocero's offices, has provided both El Vocero and News Distributor with accounting, human resources, and payroll services. At that point in time, 24 El Vocero employees, remaining in their offices, were transferred from the payroll of El Vocero to MMM, but essentially continued performing the same functions. Aside from using MMM as a conduit to transfer funds to News Distributor, the credible evidence revealed that El Vocero has never paid MMM the agreed upon service fees for its services. Prime Printing has also played a significant role by subleasing office space to News Distributor in January 2010, but has not collected rent from News Distributor.

The timing of Roca's creation of News Distributor was suspiciously close to the expiration of the CBA, and the companies had a "substantially identical" business purpose and mode of operations. See *Advance Electric,* 268 NLRB 1001 (1984). While there was not a common ownership connection, the two companies were governed by substantially similar boards of directors, which included Stein and Pompadur. Coupled with Roca's creation of News Distributor while he was president of El Vocero, it is inconsequential that he lacked an ownership interest in El Vocero at the time. *Rogers Cleaning Contractors*, 277 NLRB 482, 488 (1985) enfd. 813 F.2d 795 (6th Cir. 1987). Actual common control is more significant. See, *ADF, Inc.*, 355 NLRB No. 14 fn. 3 (2010); *Sobeck Corp.,* 321 NLRB 259, 267 (1996). While presiding over El Vocero as president, Roca initially staffed News Distributor with managers from El Vocero's circulation department and handpicked his successor, Fields. Moreover, El Vocero's direct and indirect financial support launched News Distributor's operations and enabled it to stay in operation during its first year of existence. Lastly, office equipment, furniture, and computer software was provided at no cost to News Distributor. *Diverse Steel, Inc.,* 349 NLRB at 953–954, citing *Valley Electric, Inc.,* 336 NLRB 1272 (2001), enfd. 337 F.3d 446 (5th Cir. 2003) (no compensation was given to Diverse for the change in ownership). Based on the foregoing, the evidence overwhelmingly demonstrates the existence of an alter ego relationship between El Vocero and News Distributor.

D. Assigning Supervisors Unit Work

Quintana observed Printing Press Supervisor Ortiz operate the printing press on July 7, 2009. Although still accompanied by three bargaining unit members, Ortiz did not refute Quintana's testimony that he was performing bargaining unit work. Ortiz' regular function, by his own account, was to supervise his employees and assist them whenever necessary.

The performance of unit work by supervisors is a mandatory subject of collective bargaining. See *Maintenance Service Corp.,* 275 NLRB 1422, 1427 (1985). Therefore, Ortiz' performance of bargaining unit work, in the absence of prior notice to the Union, violated Section 8(a)(5) of the Act. *J.W. Rex Co.*, 308 NLRB 473, 498 (1992) (supervisors performed unit work only under very limited circumstances prior to strike). Cf. *General Fabrications Corp.,* 328 NLRB 1114, 1125 fn. 6 (1999) (not considered a unilateral change where supervisors had regularly performed unit work in the past).

E. El Vocero Deals Directly with Employees

The General Counsel contends that El Vocero dealt directly with bargaining unit members, specifically, photojournalism department employees. El Vocero denied the charge, but did not address it in its brief.

An employer who bypasses a representative union and deals directly with bargaining unit members violates Section 8(a)(5) and (1). The traditional criteria in determining unlawful direct dealing on the part of an employer includes: direct communication with unit members; discussion intended to affect wages, hours, or other terms and conditions of employment, or seeking to undercut the union's bargaining role; and the union's exclusion from the communication. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995); *Obie Pacific Inc.*, 196 NLRB 458, 459 (1972).

By June 2009, the Union's requests for financial information were months overdue. The requests were submitted in response to El Vocero's claimed financial inability to comply with the terms of the December 26 Agreement and the CBA in general, as well as its ongoing requests to modify the terms of the CBA. Rather than provide the information and attempt to bargain, Roca sidestepped the Union and held separate meetings with employees in each department. During one such meeting, he briefed approximately six photo journalism department employees on El Vocero's predicament and the changes he was planning for the circulation department. Roca informed them that he planned to create three companies to handle El Vocero's administration, distribution, accounting, and payroll. He also belittled the Union's likely opposition to such a plan by predicting that any further discussions would wind up at an impasse. For that reason, he advised the employees to insist that the Union permit them to negotiate directly with Roca.

Under the circumstances, Roca's direct solicitation of employee sentiment and support regarding El Vocero's proposed changes to their terms and conditions of employment were clearly calculated to undermine the Union's position as their exclusive representative in violation of Section 8(a)(5). See *Modern Merchandising*, 284 NLRB 1377, 1379–1380 (1987); see also *Alan Ritchey, Inc.,* 354 NLRB No. 79, slip op. at 64 (2009); *In re Full Service Beverage Co. of Colorado*, 331 NLRB 945, 948 (2000).

CONCLUSIONS OF LAW

1. El Vocero and News Distributor are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. News Distributor was established by El Vocero as a disguised continuation and an alter ego in order to evade its responsibilities under the Act.

4. El Vocero violated Section 8(a)(1) and (5) of the Act when:

(a) It failed to abide by the terms of the December 26, 2009 Agreement between El Vocero and the Union with respect to the pension plan, cancer plan, life insurance, funeral insurance, long-term disability insurance, and gasoline allowance without the Union's consent.

(b) Since about January 2009, it unilaterally changed the unit employees' pay dates and severance payments.

(c) Since about July 2009, it unilaterally changed the unit employees' vacation, medical insurance benefits, and denied employees their bumping rights.

(d) Since June or July 2009, it unilaterally contracted out the unit work of the circulation department.

(e) Since June or July 2009, it assigned the unit work of the circulation department to its alter ego, News Distributor.

(f) About July 5, 2009, it discharged 107 employees of the circulation department as a result of contracting out the unit work.

(g) About July 5, 2009, it discharged 107 employees of the circulation department as a result of assigning unit work to its alter ego, News Distributor.

(h) About July 5, 2009, it assigned unit work to a supervisor in the press department.

(i) El Vocero engaged in the conduct described in paragraphs 4(a) through (h) without affording notice to the Union and without affording it an opportunity to bargain.

(j) About June 2009, El Vocero, by Miguel Roca, told employees that he did not want to bargain with the Union but directly with the employees.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that El Vocero and News Distributor have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

El Vocero, having eliminated the circulation department, unilaterally laid off all of that department's 107 employees and transferred their bargaining unit work to News Distributor, I shall order them to restore the status quo ante, as it existed prior to July 5, 2009. Such a restoration order is presumptively appropriate to remedy unlawful unilateral changes. See *Lear Siegler, Inc.,* 295 NLRB 857, 861 (1989). El Vocero shall, thus, offer said individuals their former jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or benefits caused by El Vocero's unilateral action in eliminating the circulation department, in accordance with *Ogle Protection Services*, 183 NLRB 682 (1970), with interest as set forth in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

I shall also order El Vocero to comply with the terms and conditions of the collective-bargaining agreement and any automatic renewal or extension of it, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit unless and until an agreement is reached or there is an impasse on all mandatory subjects of bargaining. Moreover, El Vocero is ordered to make whole employees for losses suffered by its failure to comply with the terms of the December 26 Agreement, in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979*).* The amounts are to be computed in the manner set forth in *Ogle Protection Service*, plus interest as computed in *New Horizons*, supra. Finally, upon request by the Union, El Vocero shall rescind the unilateral changes to the unit employees' pay dates, medical insurance, vacation, severance payments, and bumping rights, and bargain with the Union regarding these changes.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[137]

ORDER

The Respondent, El Vocero and its alter ego, News Distributor, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the UPAGRA, Local 33225, as the exclusive collective-bargaining representative of the employees in the bargaining unit. The appropriate unit is described in the most recent collective-bargaining agreement in effect from 1997 to 2001 between El Vocero and the Union.

(b) Failing and refusing to adhere to the terms of the December 26, 2008 agreement regarding the pension plan, cancer plan, life insurance, funeral insurance, long-term disability plan, and gas allowance.

(c) Failing and refusing to bargain collectively with the Union by unilaterally changing unit employees' pay dates, medical insurance, vacation, severance payments, and bumping rights.

(d) Undermining the majority status of the Union by telling employees that El Vocero did not want to bargain with the Union but with the employees directly.

(e) Creating an alter ego to perform circulation department work or alternatively contracting out the work of the circulation department without bargaining with the Union.

(f) Contracting out the work of the circulation department.

(g) Discharging circulation department employees as a result of closing or unilaterally contracting out the circulation department's work.

[137] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Permitting supervisors to perform bargaining unit work.

(i) In any like or related manner interfering with, restraining, or coercing El Vocero employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit.

(b) Comply with the terms of the collective-bargaining agreement, including the temporary modifications set forth in the December 26 Agreement, regarding the pension plan, cancer plan, life insurance, funeral insurance, long-term disability plan, and gasoline allowance.

(c) Cease and desist from telling employees that El Vocero does not want to bargain with the Union but with employees directly.

(d) Upon request, rescind the unilateral changes to the unit employees' pay dates, medical insurance, vacation, severance payments, and bumping rights, and bargain with the Union regarding these changes.

(e) Restore the status quo ante as it existed prior to the elimination of the circulation department on or about July 5, 2009, by offering the affected 107 employees of that department their former jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or benefits caused by El Vocero's unilateral action in eliminating the circulation department, in accordance with *Ogle Protection Services*, 183 NLRB 682 (1970), with interest as set forth in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its San Juan, Puerto Rico facility, copies of the attached notice marked "Appendix."[138] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by El Vocero's authorized representative, shall be posted by El Vocero and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by El Vocero to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, El Vocero has gone out of business or closed the facility involved in these proceedings, El Vocero shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the El Vocero at any time since January 2009.

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[138] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C. September 24, 2010

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Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the UPAGRA, Local 33225 (herein the Union), as the exclusive collective-bargaining representative of the employees in the bargaining unit. The appropriate unit is described in the most recent collective-bargaining agreement in effect from 1997 to 2001.

WE WILL NOT fail and refuse to adhere to the terms of the December 26 Agreement regarding the pension plan, cancer plan, life insurance, funeral insurance, long-term disability plan, and gas allowance.

WE WILL NOT fail and refuse to bargain collectively with the Union by unilaterally changing unit employees' pay dates, medical insurance, vacation, severance payments, and bumping rights.

WE WILL NOT undermine the majority status of the Union by telling employees that we do not want to bargain with the Union but with the employees directly.

WE WILL NOT create an alter ego to distribute the newspaper, and WE WILL NOT contract out the work of the circulation department without bargaining with the Union.

WE WILL NOT discharge our employees as a result of closing or unilaterally contracting out the circulation department's work.

WE WILL NOT permit supervisors to perform unit work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit.

WE WILL comply with the terms of the collective-bargaining agreement regarding the pension plan, cancer plan, life insurance, funeral insurance, long-term disability plan, and gasoline allowance.

WE WILL cease and desist from telling employees that we do not want to bargain with the Union but with employees directly.

WE WILL, upon request, rescind the unilateral changes to the unit employees' pay dates, medical insurance, vacation, severance payments, and bumping rights, and bargain with the Union regarding these changes.

WE WILL restore the circulation department as it existed prior to July 5, 2009, and WE WILL offer the affected 107 employees of that department their former jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or benefits caused by our unilateral action in eliminating the circulation department.

CARIBBEAN INTERNATIONAL NEWS CORPORATION, d/b/a EL VOCERO DE PUERTO RICO, INC., AND NEWS DISTRIBUTOR OF PUERTO RICO, LLC.
____
(Employer)

Dated ________________ By ______________________________
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

525 F. D. Roosevelt Avenue, La Torre de Plaza, Suite 1002
San Juan, Puerto Rico 00918-1002
Hours: 8:30 a.m. to 5 p.m.
787-766-5347

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 787-766-5377.